No. 88-1972-CSY
Status: GRANTED

Title: Illinois, Petitioner
v.
Lloyd Perkins

Docketed:
June 5, 1989

Court: Appellate Court of Illinois,
Fifth District

Counsel for petitioner: Friedl,Marcia L.

Counsel for respondent: Kirwan,Daniel M.

Entry	Date	Note	Proceedings and Orders
1	Jun 5 1989	G	Petition for writ of certiorari filed.
2	Jun 26 1989		Waiver of right of respondent Lloyd Perkins to respond filed.
3	Jun 27 1989		DISTRIBUTED. September 25, 1989
4	Jul 24 1989	F	Response requested -- BRW.
5	Aug 20 1989	X	Brief of respondent Perkins in opposition filed.
6	Aug 20 1989	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	Oct 2 1989		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Oct 2 1989		Petition GRANTED.
			**********
9	Oct 11 1989	G	Motion of respondent for appointment of counsel filed.
10	Oct 11 1989		DISTRIBUTED. OCT. 27, 1989. (MOTION FOR APPOINTMENT OF COUNSEL).
11	Oct 13 1989		Record filed.
		*	Certified copy of original record received.
12	Oct 30 1989		Motion for appointment of counsel GRANTED and it is ordered that Daniel M. Kirwin, Esquire, of Mt. Vernon, Illinois, is appointed to serve as counsel for the respondent in this case.
13	Nov 15 1989		Brief amicus curiae of United States filed.
19	Nov 15 1989		Brief amici curiae of Americans For Effective Law Enforcement, et al. filed.
15	Nov 16 1989		Brief amici curiae of Lincoln Legal Foundation, et al. filed.
16	Nov 16 1989		Joint appendix filed.
17	Nov 16 1989		Brief of petitioner Illinois filed.
20	Dec 1 1989	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
21	Dec 13 1989		Brief amicus curiae of ACLU, et al. filed.
22	Dec 19 1989		Brief of respondent Perkins filed.
24	Jan 5 1990		SET FOR ARGUMENT TUESDAY, FEBRUARY 20, 1990. (4TH CASE)
25	Jan 5 1990		CIRCULATED.
23	Jan 8 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
26	Jan 17 1990	G	Motion of Daniel M. Kirwan to vacate order of Court entered October 30, 1989, and to appoint substitute counsel filed.
27	Jan 18 1990		DISTRIBUTED. January 19, 1990. (Above motion to vacate

No. 88-1972-CSY

Entry	Date	Note	Proceedings and Orders
			order of Oct. 30, 1989.
29	Jan 18 1990	X	Reply brief of petitioner Illinois filed.
28	Jan 22 1990		Motion of Daniel M. Kirwan to vacate order of Court entered October 30, 1989, and to appoint substitute counsel GRANTED. and it is ordered that Dan W. Evers, Esquire, of Mount Vernon, Illinois, is appointed to serve as counsel for respondent.
30	Feb 20 1990		ARGUED.

88-1972

No.

Supreme Court, U.S.
FILED
JUN 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

LLOYD PERKINS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

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QUESTION PRESENTED

Whether questioning by an undisclosed undercover agent constitutes *per se* custodial interrogation as contemplated by *Miranda* merely because the suspect is incarcerated?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

LLOYD PERKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

The petitioner, People of the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, Fifth Judicial District, entered in the above-captioned proceedings on November 21, 1988.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Fifth Judicial District, is reported at 176 Ill. App. 3d 443, 531 N.E. 2d 141, and reproduced in the appendix hereto, p. 1a, *infra*.

The order of the Circuit Court of the 20th Judicial Circuit, St. Clair County, Illinois, is not reported. It is reproduced in the appendix hereto, p. 11a, *infra*.

JURISDICTION

The judgment of the Appellate Court of Illinois, Fifth Judicial District, was entered on November 21, 1988, affirming the lower court's pretrial suppression of evidence on April 8, 1987. No petition for rehearing was filed and a timely petition for leave to appeal to the Illinois Supreme Court was denied on April 5, 1989. It is reproduced in the appendix hereto, p. 10a, *infra*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Respondent was charged in the Circuit Court of the 20th Judicial Circuit, St. Clair County, Illinois, with the November 8, 1984, murder of Richard Stephenson. (C. 1, 24) Prior to trial, he filed a motion to suppress statements, alleging that they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). (C. 31-32)

At the hearing on respondent's motion, it was established that approximately 1½ years after the initiation of a fruitless investigation into Stephenson's Fairview Heights, Illinois, murder, Graham Correctional Facility inmate Donald Charlton informed police that while imprisoned there respondent told him that he had committed the offense. (R. 4-7, 57-59) Shortly thereafter, Fairview Heights police officer Stephen Walters learned that respondent was incarcerated in the Montgomery County Jail on an unrelated charge of aggravated battery. Walters and his supervisors decided that Charlton and undercover narcotics agent John Parisi should pose as Montgomery County Jail inmates to be confined with respondent in its cellblock containing approximately 12 open cells which led to a larger room with a table. (R. 8-13, 39)

After Parisi and Charlton entered the cellblock, Charlton talked with respondent briefly and introduced him to Parisi, who suggested that they attempt an escape. Respondent replied that the Montgomery County Jail was "rinky dink" and that he could arrange to have someone smuggle in a gun. The three arranged to meet again after the other inmates were asleep. Respondent, who appeared to be familiar with the operation of the jail, then showed Parisi a crowbar that was hidden in the bathroom and could be used in the jail break. (R. 40-43, 65-66)

At 11:30 p.m., respondent, Charlton, and Parisi entered cell number 6, sat on the floor, and began discussing their escape plans. After they decided that they would kill anyone who tried to stop their escape, Charlton proclaimed that he was not a murderer and deferred to the others. When Parisi asked respondent whether he had ever killed anyone, respondent answered that he had killed a man in Fairview Heights. At least partially in response to questions from Parisi and Charlton, respondent related details of the murder. (R. 43-49, 67-70) Upon completing his account, respondent lay down on the floor and slept. (R. 50) Subsequently, respondent was arrested for murder, was admonished pursuant to *Miranda*, and invoked his right to counsel. (R. 15)

The trial court rejected petitioner's argument that *Miranda* warnings were not required merely because respondent was incarcerated when the undercover agents elicited incriminating responses, and ordered suppression of the statements to Parisi and Charlton. (C. 69, 79-80) On petitioner's pretrial appeal pursuant to Ill. Rev. Stat. 1987, ch. 110A, para. 604(1), the sole issue raised was whether *Miranda* was violated. In a decision issued November 21, 1988, the Appellate Court of Illinois, Fifth Judicial District, affirmed the trial court's order, and on April 5, 1989, the Illinois Supreme Court denied petitioner leave to appeal.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW, RAISING AN ISSUE UPON WHICH STATE AND FEDERAL COURTS ARE IN CONFLICT, SIGNIFICANTLY UNDERMINES LEGITIMATE LAW ENFORCEMENT PRACTICES AND THE TRUTH-SEEKING FUNCTION OF TRIAL THROUGH AN UNWARRANTED EXTENSION OF *MIRANDA*.

The court below held that an incarcerated suspect is subjected to custodial interrogation as contemplated by *Miranda v. Arizona*, 384 U.S. 436 (1966), whenever he is questioned by a governmental agent despite the suspect's ignorance of the agent's status and the absence of any other potentially coercive circumstances. Though the ruling finds some support, it is in conflict with decisions of both state and federal courts.* More importantly, the ruling fails to honor this Court's admonition that "[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984).

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* *See People v. Williams*, 44 Cal.3d 1127, 751 P.2d 901 (1988); *People v. Aalbu*, 696 P.2d 796 (Colo. 1985) (en banc); *State v. McDonald*, 387 So.2d 1116 (La. 1980); *United States v. Willoughby*, 860 F.2d 15 (2nd Cir. 1988). *Contra Holyfield v. State*, 711 P.2d 834 (Nev. 1985); *State v. Fuller*, 204 Neb. 196, 281 N.W.2d 749 (1979); *State v. Travis*, 360 A.2d 548 (R.I. 1976). In *United States v. Lynch*, 800 F.2d 765 (8th Cir. 1986), *cert. denied*, 481 U.S. 1022 (1987), the eighth circuit expressly declined to resolve the issue, though it has suggested that an undisclosed undercover agent's deliberate elicitation of incriminating evidence from an incarcerated suspect does not constitute a *per se Miranda* violation. *See Flittie v. Solem*, 775 F.2d 933, 943 n. 17 (8th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1025 (1986).

In *Minnesota v. Murphy*, 465 U.S. 420 (1984), this Court reiterated that the "extraordinary [*Miranda*] safeguard 'does not apply outside the context of the inherently coercive custodial interrogations for which it was designed' " [465 U.S. at 430, quoting *Roberts v. United States*, 445 U.S. 552, 560 (1980)], specifying that potential for coercion typically arises in part from a suspect's unfamiliarity with the atmosphere. 465 U.S. at 433. Further, in *Rhode Island v. Innis*, 446 U.S. 291 (1980), this Court summarized its underlying concern in *Miranda* to be "that the 'interrogation environment' created by the *interplay* of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." 446 U.S. at 298 [quoting *Miranda*, 384 U.S. at 457-58 (emphasis supplied)]. Accordingly, " 'interrogation', as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." 446 U.S. at 300. Finally, in *United States v. Henry*, 447 U.S. 264 (1980), this Court recognized that the fifth amendment is not implicated by the use of undercover agents before charges are filed due to the absence of the potential for compulsion. 447 U.S. at 272-73. Under those circumstances, there exists no inherent danger that a suspect will believe "he has no choice but to submit to the [agent's] will and to confess." *Murphy*, 465 U.S. at 433.

Application of these principles to the present and similar cases compels the conclusion that legitimate law enforcement practices have been improperly restricted. Although respondent was incarcerated at the time he incriminated himself, his characterization of the Montgomery County Jail as "rinky dink", professed ability to secure a gun, access to a hidden escape tool, and involvement in an escape plan all establish his familiarity with and indeed

contempt for his surroundings. More importantly, because respondent was unaware that his accomplices were acting on behalf of the police, their status as agents alone could not have intimidated as is graphically revealed by the fact that respondent's statements arose in the context of what he perceived to be an escape planning session among confederates from which he could have departed at any time.

The investigative technique employed here was constitutionally permissible and produced reliable evidence of guilt in a murder prosecution which could not have otherwise been commenced. Further, it is a technique readily available to governmental agencies nationwide. Accordingly, the decision below affords this Court the opportunity both to correct error which has frustrated society's interests in bringing the guilty to justice and to resolve a conflict among the jurisdictions on an issue having widespread law enforcement implications.

CONCLUSION

For all the reasons discussed herein, a writ of certiorari should issue to review the decision of the Illinois Appellate Court.

Respectfully submitted,

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APPENDIX

531 N.E.2d 141

**PEOPLE of the State of Illinois,
Plaintiff-Appellant,**

v.

Lloyd PERKINS, Defendant-Appellee.

No. 5-87-0286.

Appellate Court of Illinois,
Fifth District.

Nov. 21, 1988.

Defendant was charged with murder. The Circuit Court, St. Clair County, Richard A. Hudlin, IV, J., suppressed statements defendant made to undercover police officer and informant. The State appealed. The Appellate Court, Harrison, P.J., held that *Miranda* protections applied to informal interrogation of defendant by officer and informant while defendant was in county jail.

Affirmed.

* * * * *

Presiding Justice HARRISON delivered the opinion of the court:

On March 31, 1986, the defendant, Lloyd Perkins, was charged by criminal complaint with murder in violation of section 9-1(a)(1) of the Criminal Code of 1961 (Ill.Rev. Stat. 1985, ch. 38, par. 9-1(a)(1)). The State issued a warrant for the defendant's arrest the next day. On June 19, 1986, a grand jury in St. Clair County handed up an indictment of the defendant for murder. On April 8, 1987, the circuit court of St. Clair County granted the defendant's motion to suppress statements made to an undercover police officer and to an informant. The State appeals. We affirm.

On November 8, 1984, Richard Stephenson was shot and killed in Fairview Heights, Illinois. The homicide remained unsolved as of the beginning of 1986. In March of 1986, agent Kenneth Korunka of the Department of Criminal Investigation in Litchfield, Illinois, contacted the Fairview Heights Police Department. Korunka advised that Donald Charlton, an inmate at the Graham Correctional Facility in Hillsboro, Illinois, serving a six-year prison sentence for burglary, had information concerning a homicide in the Metro East area that had occurred about two years earlier.

Charlton subsequently told Korunka in an interview that while imprisoned at Graham, he had known the defendant, and that the defendant had told him that he had murdered someone in East St. Louis. Charlton relayed the information to the police because he believed that "[p]eople should not kill people." He was not compensated in any way for his cooperation with the police. The facts Charlton related closely coincided with what the officers already knew of the unsolved murder. Korunka and Fairview Heights police officer Stephen Walters, assigned to the case from the detective unit, believed that only the perpetrator would know the facts of the murder in the detail that Charlton related.

On March 30, 1986, the officers were notified that the defendant was incarcerated in the Montgomery County Jail awaiting trial for an unrelated charge of aggravated battery. Walters and his supervisors conferred and decided for various reasons that placing an eavesdropping device in the cell with the defendant would be impractical. The police then decided to elicit the information from the defendant through a ruse involving the placement of an undercover agent, posing as an escaped convict, with the defendant in the cellblock.

On March 31, 1985, Walters, Charlton, and the undercover officer, John Parisi, a narcotics agent for the Metropolitan Enforcement Group of Southwestern Illinois, met at the Fairview Heights Police Department. Walters told

both Parisi and Charlton to refrain from questioning the defendant directly about the murder but to report anything the defendant stated concerning it. The group decided that Parisi and Charlton would inform the defendant that they had escaped from a work release program at the Graham Correctional Center and had made their way to Montgomery County in order to join with the defendant and to take him with them to California. The cover story for their presence in the jail was that while they were in Montgomery County, they ran out of money and were arrested in the process of a burglary. Parisi, assuming the alias of "Vito Bianco" and wearing motorcycle garb, and Charlton were then photographed and placed in the cellblock.

Both Parisi and Charlton later testified that after entering the cellblock, Charlton spoke with the defendant briefly and introduced Parisi. Parisi told the defendant that he and Charlton had escaped from incarceration. Parisi stated that he "wasn't going to do any more time * * *", and suggested that the three of them escape from the jail where they were currently being held. The defendant replied that the Montgomery County Jail was "rinky-dink", and that he could arrange to have someone smuggle in a gun. The three decided to meet later that evening after the other inmates went to sleep.

At the meeting later that evening, Parisi initiated the defendant's narration of the crime by asking him whether he had ever "done someone". The defendant then recounted the events of the alleged murder in detail. At 7:00 the next morning, police officer Walters learned that Parisi had signaled the guard that the defendant had spoken about the murder. Once the guards had released him and Charlton from the jail, Parisi advised Charlton to make notes of what the defendant had said. The police subsequently brought the defendant to the courthouse and placed him under arrest for murder. Walters warned the defendant pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, and the defendant requested an attorney. Parisi, of course, had not given the defen-

dant *Miranda* warnings prior to eliciting the information from him in the jail.

The trial court, on April 8, 1987, granted the defendant's motion to suppress the statements made to Parisi and Charlton. The court found that Parisi and Charlton were agents of the State who had failed to give the defendant *Miranda* warnings before conducting a custodial questioning. The State appeals.

The State contends that the trial court erred by suppressing the defendant's statements to an undercover agent where the conversation had not occurred in the sort of coercive environment in which the Supreme Court held that the police must give *Miranda* warnings. The State argues that the conversation among the defendant, Charlton, and Parisi was not interrogation, and that the conversation with the defendant, prior to the giving of *Miranda* warnings, thus offended neither the fifth amendment nor the sixth amendment of the United States Constitution.

The State contends that the trial court's determination to suppress the defendant's statements based on the Supreme Court's holding in *Miranda* was in error because Parisi and Charlton did not coerce the defendant to relate the details of the crime. The State argues that Parisi and Charlton merely engaged the defendant in friendly conversation, leading him to believe that they were compeers ready to join him in a jailbreak, and that the defendant was under no compulsion to answer the questions posed. The State asserts that Parisi's status as an agent of the prosecution did not undermine the defendant's will to resist answering the questions because the defendant believed that Parisi was a "biker", rather than an undercover agent. The State contends that the defendant made his statements freely, voluntarily, and without compulsion, and that the defendant was not placed in a "police-dominated" atmosphere because the defendant was familiar with the jail and was thus insulated from the police department's use of psychological intimidation.

In *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the Supreme Court held that a prosecutor may not use an exculpatory or inculpatory statement arising from a custodial interrogation of a defendant unless the prosecutor can demonstrate the use of procedural safeguards effective to secure the defendant's privilege against incriminating himself. (*Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706.) The *Miranda* decision applies to statements made pursuant to a "custodial interrogation," which the Court defined as "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning * * *." (*Miranda*, 384 U.S. at 478, 86 S.Ct. at 1630, 16 L.Ed.2d at 726.) The *Miranda* decision requires the agent of the prosecution to warn the defendant prior to questioning that: (1) he has the right to remain silent; (2) anything he says can be used against him in a court of law; (3) he has the right to have an attorney present; and (4) if he cannot afford an attorney one will be appointed for him prior to questioning if he so desires. *Miranda*, 384 U.S. at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726.

The *Miranda* opinion applies only to "custodial" interrogations. In the case *sub judice* we note that, although the defendant was incarcerated on other charges at the time Parisi and Charlton elicited the incriminating statements, he was "in custody" for purposes of *Miranda*. As the Supreme Court concluded in *Mathis v. United States* (1968), 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381, nothing in the *Miranda* opinion makes the necessity for warnings dependent on the particular reason why the defendant is in custody. (*Mathis*, 391 U.S. at 4-5, 88 S.Ct. at 1505, 20 L.Ed.2d at 385.) Thus *Miranda* applies even when the purpose of the custody is unrelated to the purpose of the interrogation, as in the instant case.

Miranda also applies when the questioning is indirect. In *Rhode Island v. Innis* (1980), 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297, the Supreme Court held that prosecutorial interrogations necessitating *Miranda* warnings

need not amount to actual questioning. The Court found that the term "interrogation" as used in *Miranda* "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Innis*, 446 U.S. at 301, 100 S.Ct. at 1689-90, 64 L.Ed.2d at 308, see also *People v. Scott* (1987), 159 Ill.App.3d 459, 463-64, 111 Ill.Dec. 447, 449-50, 512 N.E.2d 836, 838-39.) Thus the State's argument that Parisi's conversation with the defendant was not questioning for the purposes of *Miranda* fails, because the placement of Parisi in the cellblock with the defendant, and Parisi's inquiry whether the defendant had ever "done someone" were words and actions reasonably likely to elicit an incriminating response from the defendant.

While no cases in Illinois have directly addressed the issue of whether an undercover agent's interrogation of a defendant requires warnings pursuant to *Miranda*, other jurisdictions have applied the requirements of *Miranda* in cases involving an informant's custodial questioning of a defendant. In *Holyfield v. State* (1985), 101 Nev. 793, 711 P.2d 834, the Nevada Supreme Court held that the prosecution's failure to warn a defendant pursuant to *Miranda* renders an informant's surreptitious custodial questioning inadmissible. In *Holyfield*, two men robbed a credit union in Reno. The police subsequently arrested the defendant on an unrelated charge of robbery. The police warned the defendant pursuant to *Miranda* and questioned him about the robbery of the credit union. The defendant denied any involvement in the robbery. The police then enlisted the aid of an informant and placed the informant in the cell with the defendant to obtain information about the robbery. The informant subsequently related to the police that the defendant had admitted the robbery, and told the police his version of the statements made by the defendant. At a hearing on the defendant's motion to suppress the statements, the court ruled that the statements were admissible. The jury found the defendant guilty of the robbery, and the defendant appealed.

The *Holyfield* court agreed with the defendant's assertion that the admission of the evidence violated his fifth amendment constitutional right against self-incrimination. The court held that the fact that the agent of the police has not advised the defendant of his *Miranda* rights prior to the questioning created a situation where the police ploys subverted "constitutional guarantees which are designed to assure fairness and integrity in the truth-seeking process." *Holyfield*, 101 Nev. at 806, 711 P.2d at 842.

Decisions from other jurisdictions also support the proposition that the Supreme Court's *Miranda* decision covers an informant's custodial elicitation of information from a defendant. In a Nebraska case (*State v. Fuller* (1979), 203 Neb. 233, 278 N.W.2d 756, *reh'g overruled*, 204 Neb. 196, 281 N.W.2d 749), the police suspected the defendant, incarcerated on unrelated charges, of murdering a fellow prisoner. One of the defendant's cellmates agreed to cooperate with the authorities by attempting to induce the defendant to discuss his role in the inmate's death. The defendant allegedly made incriminating statements to the cellmate. The cellmate's testimony regarding the defendant's incriminating statements was admitted at trial, and the jury found the defendant guilty of murder. On appeal, the Nebraska Supreme Court held that the testimony regarding the defendant's statements was inadmissible. "Since [the cellmate] was acting as a police agent, this was custodial interrogation and the defendant was entitled to the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694." *Fuller*, 204 Neb. at 196, 281 N.W.2d at 749.

In *State v. Travis* (1976), 116 R.I. 678, 360 A.2d 548, a case with facts similar to those of the instant case, the police arrested the defendant for robbery. The police then placed an undercover officer into the cell with the defendant. The undercover officer had very long hair, a long beard, and wore "mod-type" clothing. The officer later claimed that, after he conversed with the suspect to put him at ease, the suspect made several statements amounting to a confession of the robbery. The defendant brought

a motion to suppress the undercover officer's testimony but the trial judge denied the motion. The suspect was charged, convicted, and sentenced to life imprisonment. As in the instant case, the State argued that the defendant's statements had not been compelled but, rather, had been volunteered freely and were, therefore, admissible into evidence. In reversing the conviction, the Rhode Island Supreme Court held, as we do, that the ruse employed by the police violated the defendant's rights under the fifth amendment of the constitution. *Travis*, 116 R.I. at 682, 360 A.2d at 551.

We reject the state's contention that *Miranda* applies only in those situations where a figure of authority directly interrogates the accused. There is no authority in these circumstances for the police to do indirectly what they may not do directly. Underlying the rationale of the *Miranda* decision is the conviction that a warning before questioning is essential in overcoming the pressures of interrogation and in aiding the truth-finding function. The warning ensures that the defendant knows that he is free to exercise his constitutional privilege against self-incrimination. (*Miranda*, 384 U.S. at 469, 86 S.Ct. at 1625, 16 L.Ed.2d at 720.) The privilege is fulfilled only when the defendant is "guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." (*Miranda*, 384 U.S. at 460, 86 S.Ct. at 1620, 16 L.Ed.2d at 715.) The defendant's fifth amendment constitutional privilege is thus fulfilled only when the agent of the prosecution warns the defendant of his rights pursuant to *Miranda* prior to custodial questioning. In the present case the defendant's statements were not given through a knowing and intelligent waiver of his rights, but were in fact the questionable product of an intentional subversion of those rights.

The procedural safeguards set forth by the Supreme Court in *Miranda* are the only established means to protect the defendant's constitutional right against self-incrimination, one of the central concepts of our American system of criminal jurisprudence. We cannot permit the police to

subvert this important constitutional right by engaging in surreptitious tactics as employed in this case. The judiciary must apply constitutional rights, even under new and perhaps difficult circumstances, or the "constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality." (*Weems v. United States* (1910), 217 U.S. 349, 373, 30 S.Ct. 544, 551, 54 L.Ed. 793, 801.) We cannot permit the police to subvert the defendant's fifth-amendment right against self-incrimination by questioning the defendant, through informants and while he was in custody, without first warning him of his rights pursuant to *Miranda*. We would render the defendant's fifth-amendment privilege wholly meaningless were we to do so.

Since we find that *Miranda* applies in this situation, we must also find that the failure to warn the defendant pursuant to *Miranda* renders the defendant's statements to Parisi and Charlton in the Montgomery County Jail inadmissible. (*People v. Scott* (1987), 159 Ill.App.3d 459, 111 Ill.Dec. 447, 450, 512 N.E.2d 836, 839.) Therefore, we affirm the determination of the circuit court of St. Clair County.

AFFIRMED.

CALVO and WELCH, JJ., concur.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

April 5, 1989

State's Attorneys Appellate Prosecutor
Fifth Judicial District
Route 15 East, P. O. Box 2249
Mt. Vernon, IL 62864

No. 68043—People State of Illinois, petitioner, v. Lloyd Perkins, respondent. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Calvo, J., took no part.

The mandate of this Court will issue to the Appellate Court on April 27, 1989.

[Dated April 8, 1987]

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT OF ILLINOIS
ST. CLAIR COUNTY

PEOPLE OF THE STATE OF ILLINOIS,

VS. No. 86-CF-305

LLOYD RAY PERKINS,

Defendant.

ORDER

This matter coming before the Court on defendant's Motion to Suppress Statement, the Court having read transcript of evidence and heard arguments of counsel and having conducted its own research of the law, orders as follows:

The Motion to Suppress the Statement of defendant, Lloyd Ray Perkins, made in the presence of Agent Parisi and defendant's fellow-inmate Charleston, is hereby granted. This ruling is based upon the findings of the Court that both Parisi and Charleston were agents of the State and conducted questioning of the defendant concerning the alleged offense while he was in custody and without advising him of his rights as required by Miranda vs. Arizona (1966) 384 U.S. 436. Both Parisi and Charleston will be prohibited from testifying as to that statement in any trial of this case.

/s/ Richard A. Hudlin IV
Hon. Richard A. Hudlin IV

[C-69]

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

Supreme Court, U.S.
FILED
AUG 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF ILLINOIS, PETITIONER,

VS.

LLOYD PERKINS, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIFTH JUDICIAL DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

DANIEL M. KIRWAN *
Deputy Defender

Dan W. Evers
Assistant Defender

Office of the State Appellate Defender
Fifth Judicial District
Route 15 East - P.O. Box 2430
Mount Vernon, Illinois 62864
(618) 244-3466

COUNSEL FOR RESPONDENT
*Counsel of record

10 pp

QUESTION PRESENTED FOR REVIEW

Whether the factual determinations of the Circuit Court of St. Clair County, Illinois and the Appellate Court of Illinois, Fifth Judicial District, that the respondent was subjected to custodial interrogation under Miranda should be disturbed by This Court?

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NO. 88-1972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF ILLINOIS, PETITIONER,

VS.

LLOYD PERKINS, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS
FIFTH JUDICIAL DISTRICT

BRIEF IN OPPOSITION

The respondent, Lloyd Perkins, by counsel, Daniel M. Kirwan, Deputy Defender, Office of the State Appellate Defender, Fifth Judicial District, respectfully requests that This Honorable Court deny the State of Illinois' petition for writ of certiorari to the Appellate Court of Illinois, Fifth Judicial District, seeking review of the Appellate Court's decision rendered on November 21, 1988. The opinion is reported at People v. Perkins, 176 Ill. App. 3d 443, 531 N.E.2d 141 (5th Dist. 1988).

REASONS WHY THE PETITION SHOULD BE DENIED

THIS COURT SHOULD DENY THE PETITION BECAUSE IT FAILS TO PRESENT AN ISSUE OF SUFFICIENT IMPORTANCE UNDER THIS COURT'S RULE 17 TO MERIT REVIEW AND BECAUSE THE DECISION BELOW IS CORRECT.

The State of Illinois has petitioned This Court to review the decision of the Appellate Court of Illinois, Fifth Judicial District, which affirmed the order of the Circuit Court of St. Clair County suppressing statements made by the defendant. The State of Illinois had filed a petition for leave to appeal to the Illinois Supreme Court (Ill. Rev. Stat., 1987, Ch. 110A, §315), which was denied by the Illinois Supreme Court. This Court

should similarly deny review, because the State of Illinois' petition fails to present a question of sufficient importance for merit review under This Court's Rule 17, and because the decision of the Appellate Court of Illinois is correct.

The State of Illinois' petition apparently attempts to present this case as a "conflicts case" between decisions of state and federal courts warranting This Court's review. (State's petition at 5) However, the decision for which it seeks review is that of the Appellate Court of Illinois, Fifth Judicial District, not that of the Illinois Supreme Court. Under This Court's Rule 17.1(b), review of conflict cases is appropriate "[w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals." (emphasis added) This Court's Rule 17.1(b) is not applicable because the decision to be reviewed is not that of the state court of last resort.

Under This Court's Rule 17.1(c), review is appropriate "[w]hen a state court ... has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." The State of Illinois' petition attempts to bring review of this case under the last concern of Rule 17.1(c), that the Appellate Court of Illinois' decision is in some "way in conflict with applicable decisions of this Court". The State's petition states that the Appellate Court's "ruling fails to honor this Court's admonition" in Berkemer v. McCarty, 468 U.S. 420 (1984). (State's petition at 5) In Berkemer This Court stated that "[f]idelity to the doctrine announced in Miranda [v. Arizona, 384 U.S. 436 (1966)] requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." 468 U.S. at 437. However, the Appellate Court of Illinois' decision does not conflict with Berkemer or any other decision of This Court. Berkemer did not establish new standards to restrict the reach of Miranda v. Arizona, 384 U.S. 436 (1966). In Berkemer This Court held that Miranda warnings are required in

all misdemeanor cases in which the defendant is taken into custody. The Court held that Miranda warnings are not requ... for questioning during a traffic stop, until the motorist "is ... subjected to treatment that renders him 'in custody'", at which point Miranda warnings are required. Berkemer, 468 U.S. at 440. This holding of Berkemer is merely a restatement of Miranda because it holds that the question of whether there is a simple traffic stop or whether the motorist has been taken into custody and subjected to interrogation is to be resolved by the trial court in its fact-finding function. The Appellate Court's, and the Circuit Court of St. Clair County's, decisions suppressing the defendant's statements follow the well-settled principles of Miranda. The essential dispute by the State is with the factual determinations made by the Circuit Court of St. Clair County in the application of Miranda, and the acceptance of those factual determinations by the Appellate Court of Illinois.

The only basis for review left to the State in its petition is that "a state court ... has decided an important question of federal law which has not been, but should be, settled by this Court". U.S. Sup. Ct. R. 17. However, the petition fails to demonstrate the importance of the question presented so as to merit review by This Court. The cases cited by the State of Illinois to demonstrate a split between various courts on the question reveal that there is not a looming problem to be addressed by This Court. Three of the four cases that the State of Illinois cites for its position as being in conflict with the decision in this case (State's petition at 5) have been denied review by This Court. United States v. Willoughby, 860 F.2d 15 (2nd Cir. 1988), cert. denied, __ U.S. __, 109 S.Ct. 846, 102 L.Ed. 2d 978 (1989); People v. Williams, 44 Cal. 3d 1127, 751 P.2d 901 (1988), cert. denied, __ U.S. __, 109 S.Ct. 514, 102 L.Ed. 2d 549 (1988); State v. McDonald, 387 So.2d 1116 (La. 1980), cert. denied, 449 U.S. 957 (1980).

Two of the cases cited by the State of Illinois for its ...tition (State's petition at 5) are not appropriate to the legal discussion here. See Willoughby and People v. Aalbu, 696 P.2d

796 (Colo. 1985)(en banc). In both Willoughby and Aalbu statements made by the defendants were not introduced into evidence as statements concerning a past criminal act, but as statements concerning an ongoing criminal conspiracy; thus the statements made by the defendants were an offense.

In Willoughby the codefendant, Arthur Prioleau, was convicted of conspiracy to obstruct justice in connection with his pending trial for armed robbery. Prioleau was incarcerated on the armed robbery charge and had a conversation with a former girlfriend, Sabrina Johnson. During the conversation, Johnson wore a concealed recording device provided by the government. In the conversation, Prioleau made statements that the defendants had sent threats to one witness and had attempted to locate another witness to prevent their "standing[ing] in our way". Willoughby, 860 F.2d at 18. Prioleau also had threatened Johnson to not tell the police anything concerning the armed robbery. These statements were not introduced into evidence at the armed robbery trial but at the trial for conspiracy to obstruct justice. These statements were part of the conspiracy for which Prioleau was on trial. Consequently, Willoughby stands for the unremarkable proposition that Miranda warnings need not be given to a prisoner when the conversation involved is itself a criminal violation, because as a factual matter the conversation is not a custodial interrogation concerning a past criminal violation.

In Aalbu, the defendant, Gene Aalbu, was convicted of criminal solicitation to commit first-degree murder. Aalbu was imprisoned for a drug conviction. While imprisoned he met and conversed with another inmate, James Ross. Ross had worked as an police informant on prior occasions. In those conversations, Aalbu told Ross that he wanted some people killed. In later conversations, Aalbu told Ross that he wanted one of his codefendants, Mark Olson, killed. Ross agreed to kill Olson for a pickup truck, a gun, and some money. Ross reported these conversations to the police. These conversations formed the ...me of solicitation. Aalbu stands for the same unremarkable proposition as Willoughby.

The decision in this case also does not warrant review because the Appellate Court here upheld a federal constitut right of the respondent. This Court's primary purpose should be to ensure "that certain rights are firmly secured against possible oppression by the Federal or State Governments." Florida v. Meyers, 466 U.S. 380, 385 (1984) (Stevens, J., dissenting). As Justice Stevens further stated in Meyers, This "Court must be ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor." Id. at 387. That the Illinois Supreme Court denied review of the case further demonstrates that a manifest injustice against the State was not committed requiring This Court's intervention.

Further, the decisions of both the Circuit Court of St. Clair County and the Appellate Court of Illinois are correct applications of the settled law of Miranda. In the hearing on the motion to suppress, the circuit court was required to determine the factual questions of whether there was (1) custody, (2) interrogation, and (3) failure to give the proper warnings under Miranda. That the circuit court determined as a factual matter that there was custodial interrogation without warnings under Miranda was a decision within its discretion and supported by the facts of this case. On review, the Appellate Court of Illinois was required to affirm the circuit court's factual determinations unless found to be manifestly erroneous. People v. Conner, 78 Ill. 2d 513, 401 N.E.2d 513 (1979). That the Appellate Court affirmed is merely a reflection that the discretion vested in the circuit court had not been abused and therefore did not permit reversal. This Court should not interfere in these factual determinations made by the Illinois courts.

CONCLUSION

Because the State's petition fails to raise a question of sufficient importance for This Court's review, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dan W. Evers
Assistant Defender

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* Counsel of record

NO. 88-1972

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE PEOPLE OF THE STATE OF ILLINOIS, PETITIONER,

VS.

LLOYD PERKINS, RESPONDENT.

NOTICE AND PROOF OF SERVICE

TO: Honorable Joseph F. Spaniol, Jr.
Clerk of the Supreme Court
of the United States
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Washington, D.C. 20543

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The undersigned, being first duly sworn on oath, deposes and states that she has mailed the typewritten original of the brief in opposition for the respondent and the motion for leave to proceed in forma pauperis in the above-captioned matter to the Clerk of the Supreme Court and that I am serving the Illinois Attorney General, and the respondent each with one copy by depositing the copies in the mail in Mt. Vernon, Illinois, with sufficient prepaid postage and addressed as indicated, and by hand delivery to the State's Attorneys Appellate Service Commission, on this 17th day of August, 1989.

Stephanie Fletcher

Subscribed and sworn to before me

this 17th day of August, 1989.

Pamela S. Richardson
Notary Public

OFFICIAL SEAL
PAMELA S. RICHARDSON
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 6-30-92

No. 88-1972 (6)

Supreme Court, U.S.
FILED
NOV 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

LLOYD PERKINS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, Fifth Judicial District

JOINT APPENDIX

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State of Illinois

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Petition For Writ Of Certiorari Filed June 2, 1989
Certiorari Granted October 2, 1989

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The Order of the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, is not Reported and is Included in the Petition for Writ of Certiorari at the Appendix (11).

The Opinion of the Appellate Court of Illinois, Fifth Judicial District, is Reported at 176 Ill. App. 3d 443, 531 N.E.2d 141 (5th Dist. 1988), and is Included in the Petition for Writ of Certiorari at the Appendix (1).

No. 88-1972

In The

Supreme Court of the United States

October Term, 1988

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

LLOYD PERKINS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, Fifth Judicial District

JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	ITEM
April 1, 1986	Complaint Filed in the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois
June 19, 1986	Bill of Indictment filed in the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois
July 31, 1986	Respondent's Motion to Suppress Confessions Filed
November 14, 1986	Respondent's Motion to Suppress Filed
February 18, 1987	Hearing Held on Respondent's Motions to Suppress
April 7, 1987	Argument Held on Respondent's Motion to Suppress
April 8, 1987	Order of the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, Granting Respondent's Motion to Suppress, Filed
April 15, 1987	Petitioner's Notice of Appeal Filed
November 21, 1988	Opinion of the Appellate Court of Illinois, Fifth Judicial District, Affirming the Circuit Court's Order of Suppression, Filed
December 21, 1988	Petitioner's Petition for Leave to Appeal Filed

April 5, 1989	Order of the Illinois Supreme Court, Denying Petitioner Leave to Appeal, Filed

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE TWENTIETH
JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS	)	
VS.	)	No. 86-CF-305
	)	WARRANT
LLOYD RAY PERKINS	)	NO. 4746
321 WEST CORWIN	)	CLASS . . MURDER
LITCHFIELD, IL.	)	FILED APRIL 1, 1986
Defendant	)	
D.O.B. 5/26/65	)	

CRIMINAL COMPLAINT

Complainant, DET. STEVE WALTERS, FAIRVIEW HEIGHTS POLICE DEPARTMENT on oath charges: that on the 8th day of NOVEMBER, 1984, in said County, LLOYD RAY PERKINS, committed the offense of MURDER, in that:

THE SAID DEFENDANT WITHOUT LAWFUL JUSTIFICATION AND WITH THE INTENT TO KILL RICHARD E. STEPHENSON, SHOT RICHARD E. STEPHENSON WITH A GUN IN THE LEG THEREBY CAUSING THE DEATH OF RICHARD E. STEPHENSON,

in violation of Section 9- 9a (1) Chapter 38, Illinois Revised Statutes.

/s/ Det. Steve M. Walters
(Complainant)

Subscribed and sworn to before me this 31st day of MARCH A.D. 1986.

/s/ Richard A. Hudlin IV
Judge of the Circuit Court

Approved /s/ Dennis Hatch
Asst. State's Attorney
DENNIS HATCH, WARRANT OFFICER

IN THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
vs.	)	NO. 86-CF-305
LLOYD R. PERKINS, Defendant.	)	FILED JULY 31, 1986

MOTION TO SUPPRESS CONFESSIONS

Now comes the defendant, Lloyd R. Perkins, by his attorneys, Clyde L. Kuehn, Public Defender, and Eric M. Rhein, Assistant Public Defender, and for defendant's Motion to Suppress Confessions states as follows:

1. That the State's evidence at trial will be that defendant allegedly confessed murdering Richard E. Stephenson to a DCI informant, an agent to the State of Illinois, who was incarcerated along with defendant at the Graham Correctional Facility in Hillsboro, Illinois. Said alleged confession was obtained by said informant in violation of defendant's right to due process and, specifically, in violation of defendant's *Miranda* rights.

2. That the State's evidence will be, at trial, that defendant allegedly confessed to the murder of Richard Stephenson on another occasion, while incarcerated in a jail [cell] along with said DCI informant and a DCI undercover agent. Said alleged confessions were elicited by the

State's agents in violation of defendant's due process rights, and, specifically, in violation of defendant's *Miranda* rights.

WHEREFORE, defendant prays that the Court enter an Order suppressing said alleged confessions as evidence in the trial of this cause.

/s/ CLYDE L. KUEHN
CLYDE L. KUEHN

KUEHN & RHEIN
ATTORNEYS AT LAW
2027 West Main Street
Belleville, Illinois, 62223
(618) 227-6646

IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, vs. LLOYD PERKINS, Defendant.	)	NO. 86-CF-305 FILED NOV 14, 1986

MOTION TO SUPPRESS

Comes now Clyde L. Kuehn, attorney for defendant, Lloyd Perkins, and respectfully requests suppression of statements allegedly made to Agent Parisi of the Department of Law Enforcement, such statements were elicited by agents of the State acting in an undercover capacity while the defendant was in custody and constitute knowing exploitation by the State of an opportunity to confront the accused without counsel being present, in violation of rights guaranteed under the Fifth and Sixth Amendments to the Constitution.

/s/ CLYDE L. KUEHN
CLYDE L. KUEHN

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IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT OF ILLINOIS
ST. CLAIR COUNTY

THE PEOPLE OF THE STATE ILLINOIS V. LLOYD PERKINS, Defendant.	)	No. 86-CF-305

REPORT OF PROCEEDINGS

Before the HON. JOHN J. HOBAN
February 18, 1987

MOTION TO SUPPRESS

APPEARANCES:

Ms. Lisa Franke
Assistant State's Attorney
On Behalf of the People;

Mr. James Radcliffe
Assistant Public Defender
On Behalf of the Defendant.

Debra M. Musielak, CSR, CM
Official Court Reporter

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. . .

(p. 4) *STEPHEN WALTERS*

(being called as a witness on behalf of the People, upon being duly sworn, testified as follows)

DIRECT EXAMINATION

BY MS. LISA FRANKE

Q. Would you please state your name and occupation?

A. Stephen Walters, Police Officer for the City of Fairview Heights.

Q. And Mr. Walter, directing your attention back to November of 1984, were you so employed on that date?

A. Yes, ma'am.

Q. And what capacity were you employed at the Fairview Heights Police Department?

A. I was assigned to the Detective Unit.

Q. Did you respond or have you been assigned to the (p. 5) case of People v. Lloyd Perkins?

A. Yes, ma'am.

Q. And at that time what was your involvement with that particular case?

A. I was the case agent, the primary investigating officer.

Q. As the primary investigative officer what were your duties and responsibilities with that case?

A. To just investigate the case and develop any possible suspects that could have committed the offense.

Q. Back in November of 1984, after your initial investigation, after the initial offense report did you have any suspects at that time?

A. No, ma'am.

Q. And, did you later develop a particular suspect?

A. Yes, ma'am.

Q. And when would that have been?

A. We were contacted by Division of Criminal Investigation, Agent Kenny Korunka from District 18 up in Litchfield, Illinois, concerning a prisoner that was incarcerated at the Graham Correctional facility in Hillsboro, Illinois, that had some information regarding a homicide that had occurred in the East St. Louis area approximately two years ago, and it was stated at that time (p. 6) through the agent in October of 1984 –

Q. Was the information that you were provided by Agent Korunka corroborative of the information you knew about the incident that had happened in November of 1984?

A. Yes, ma'am.

Q. And based upon that what, if anything, did you do?

A. We got some further information from the agent, did some background on the person that he was getting the information from. We set up a meeting with – through the Department of Corrections with the inmate by the

name of Donald Scott Charlton and interviewed him on March the 14th of 1986.

Q. During the course of that conversation, did Mr. Charlton indicate to you information about the death of Mr. Stevenson?

A. He did not know the victim's name. He supplied us with information concerning conversations he had had with an inmate that was there at Graham also concerning a homicide or a murder, as he called it, had occurred in the East St. Louis area. The facts that were given to us by Mr. Charlton corroborated what we had already known about the death of Mr. Stevenson.

Q. And who was the individual that he had been receiving his information from?

(p. 7) A. Mr. Charlton identified Lloyd Ray Perkins is being the one who had given him the information.

Q. After your first conversation with Mr. Charlton, what did you next do in attempt to further investigate his claims of what he had heard from Mr. Perkins?

A. Well, we continued our investigation. We had found out that Mr. Perkins had been released from the Graham Correctional Fac..ity on March the 5th, 1986, so, we had the person we were getting the information from inside the correctional facility and the suspect outside the correctional facility. So at that point we petitioned the Court for a writ in order to get the inmate Charlton released from the Graham Correctional Facility and we also petitioned the Montgomery County State's Attorney's Office and Court up there for an eavesdrop in order

for Mr. Charlton to make contact with Mr. Perkins and possibly get some more information.

Q. So the writ to have Mr. Charlton taken out of the penitentiary was issued by a Court in this county?

A. Yes, ma'am.

Q. And the eavesdrop order was issued by the State's Attorney's Office in Montgomery County, is that correct?

A. That's correct.

Q. It was authorized by a Montgomery County Court?

(p. 8) A. That's correct.

Q. What was the eavesdrop order to pertain to?

A. A conversation with the informant, Mr. Charlton, and the defendant, or the suspect at this point, Lloyd Ray Perkins, concerning the death of Mr. Stevenson.

Q. At this time what were the arrangements in terms of whether that conversation was to take place?

A. Well, we took Mr. Charlton to our Police Department. We had him try to contact Mr. Perkins' residence that he had received Mr. Perkins' phone number while they were in jail together. He made numerous attempts to contact the defendant, Mr. Perkins, at his grandfather's residence to no avail. We transported Mr. Charlton up to the Litchfield area where Mr. Perkins resided, and also tried to make contact with Mr. Perkins, again to no avail.

Q. Did you later find out information about the whereabouts of Mr. Perkins?

A. Yes, we were advised on March the – March the 30th that Mr. Perkins had been incarcerated again at the Montgomery County Jail pending some formal charges in an unrelated incident.

Q. And at that time what, if anything, did you attempt to do?

A. That was a Saturday, March 30th we – when I say we (p. 9) I'm talking about myself, my supervisors, talked it over and at that point we thought the best way to proceed was to possibly put someone inside the jail with Mr. Perkins in order to have this conversation take place.

Q. At that time did you discuss with the State's Attorney Barbara Adams from Montgomery County about the continuation of the eavesdrop order she had previously given to you?

A. The eavesdrop order was still in effect. I didn't have any – I can't recall any conversations regarding – I may have talked to Mrs. Adams or Miss Adams regarding using eavesdrop in the jail, I can't recall.

Q. Did you at that time discuss with the State's Attorney's Office in this county, Mr. Baricevic about using an eavesdrop while inside the County Jail?

A. Yes, ma'am.

Q. What was your discussion with Mr. Baricevic?

A. If we back up for a minute, I do remember I talked to Mrs. Adams. She referred me to Mr. Baricevic as to the offense happened in his jurisdiction. When I conferred with Mr. Baricevic we were told by Mr. Baricevic

that I don't believe we could have done an eavesdrop in an institution.

Q. And what were some of the reasons why you were reluctant to do an eavesdrop in an institution?

(p. 10) A. Well, after talking to Mr. Baricevic that became secondary to the fact that we were planning on putting an undercover officer in the institution, also, and due to safety considerations of Special Agent Parisi, who works for the Metropolitan Enforcement Group, it was decided that we weren't going to use an eavesdrop due to the safety reasons.

Q. The eavesdrop wire would have been on his person?

A. Yes, but the logistics wouldn't have worked out. We would have had to call – we would have had to be changing tapes. Mr. Parisi – we didn't know how fast any conversation would take place, to begin with. He was put in there on a Sunday. We would have had to change tapes a number of times. We would have had to change batteries a number of times, and, it was decided that Mr. Parisi would stay in there a max of three days or until a conversation took place between the suspect and himself regarding the homicide.

Q. After that decision was made, did you contact Agent Parisi yourself?

A. Yes.

Q. When would it have been that you contacted Agent Parisi?

A. I had talked to Agent Parisi's Supervisor on Sunday March the 31st, who agreed that if Agent Parisi was willing (p. 11) to take the assignment that it was no problem with him. I cõntacted Special Agent Parisi who was interested. We set up a meeting for later that afternoon and he agreed to enter the Montgomery County Jail with Donald Scott Charlton, the informant in this case, posing as two escaped convicts.

Q. At the time of your initial conversation with Agent Parisi or his supervisor, did you indicate to them the details of the murder case?

A. No. No, ma'am..

Q. What, if anything, did you tell Agent Parisi about what he was to be doing?

A. The only thing that Mr. Parisi was told was that there was a murder that had occurred in Fairview Heights, and that this person was a suspect and we'd got information through Mr. Charlton that this person knew about the murder and had admitted to doing the murder prior to that, to Mr. Charlton, and that he was supposed to engage the person in conversation, and if any conversation came up regarding the murder, to relay that information to us.

Q. Was he told the details of the conversations that you had had with Mr. Charlton?

A. The only thing Mr. Parisi was told about Mr. Charlton was that they were – that he was an inmate with Perkins at Graham Correctional Facility and Mr. Charlton knew (p. 12) nothing of the murder other than what he had heard from Mr. Perkins.

Q. Were you present at the time that Agent Parisi and Mr. Charlton met at the Fairview Heights Police Department?

A. Yes, ma'am.

Q. What, if anything, was the conversation between the two of them at that time?

A. That was approximately 5:30 on March 31st. Special Agent Parisi responded to the Fairview Heights Police Department. We went over with Mr. Charlton – we, myself, Mr. Charlton and Mr. Parisi, went over the ruse they would use to enhance their cover, and that was to be that they had both escaped from the – or that Mr. Charlton had been transferred to a work release program where he met Mr. Parisi and they had escaped there, went to Litchfield area to meet Mr. Perkins concerning that Charlton and Perkins were buddies, and at that point that they were going to, you know, play that they were escaped convicts and they were going to end up doing some other crimes together but they ended up getting arrested and getting thrown in the Montgomery County Jail with Mr. Perkins.

Q. During the discussion between Agent Parisi and Mr. Charlton did Mr. Charlton indicate to Agent Parisi in your presence the details of what conversation he had told you (p. 13) previously about what Mr. Perkins had told him?

A. No, ma'am.

Q. To the best of your knowledge was Agent Parisi ever advised of the details prior to him entering the Montgomery County Jail?

A. No, ma'am. We purposely did not tell him anything regarding the murder.

Q. What time was it they went to the Montgomery County Jail?

A. We met with the Sheriff Jim Moore at approximately ten minutes after eight that evening.

Q. What happened at that time?

A. At that time both Mr. Charlton and Mr. Parisi were placed in the County Jail as their regular routine as they were arrested, supposedly arrested.

Q. At the time that they entered the Montgomery County Jail, was Mr. Perkins charged with the offense of murder, of a November murder of Mr. Stevenson?

A. No, ma'am.

Q. And at that time had you had any discussions with the State's Attorney's Office regarding the charge of murder?

A. The State's Attorney's Office had been kept apprised, but we had never applied for any type of warrant at that point.

(p. 14) Q. So at that time he had not been charged with any murder of Mr. Stevenson?

A. Yes, ma'am.

Q. What arrangements, if any, had you made with the Montgomery County Jail in terms of getting information to you from Agent Parisi or from Mr. Charlton?

A. When I spoke to the Sheriff, a signal was set up that once Mr. Parisi felt that safety was a factor, or that he

had heard enough conversation through Mr. Perkins, that he would signal the Sheriff or the Guard on duty saying that he was sick. At that point we would know to get Mr. Perkins and Mr. Charlton – I mean, sorry, Mr. Parisi and Mr. Charlton out of the cell with Mr. Perkins.

Q. Was that ever done?

A. Yes, ma'am.

Q. When was that done?

A. I was contacted by the supervisor, Mr. Parisi at seven o'clock in the morning – the next morning would have been March the 31st.

Q. What, if anything, did you do in response to a conversation with him?

A. At that point Special Agent Remelius of being a supervisor, Agent Parisi, advised me that he had been contacted by Special Agent Parisi and that he had heard (p. 15) enough conversation through Mr. Perkins regarding the murder, and at that point we met at the Fairview Heights Police Department and we contacted Assistant State's Attorney Dennis Hatch. We proceeded up to the Hillsboro – Hillsboro to the Montgomery County Jail.

Q. At any time subsequent to that was Mr. Perkins arrested for the murder of Mr. Stevenson?

A. No, ma'am.

Q. Okay. When was he finally arrested for that offense?

A. After we had entered – after Mr. Perkins was brought over from the jail cell to the Courthouse, Mr.

Perkins was advised by myself that he was being placed under arrest. At that point I formally requested a warrant from Dennis Hatch at which time he put, took it under advisement. Subsequently Mr. Perkins was interviewed the next day – he was mirandized, interviewed the next day. A warrant was issued through the State's Attorney's Office.

Q. Okay. On the day that you advised Mr. Perkins of his rights, did he give you a statement at that time?

A. No, ma'am.

Q. What, if anything, was his response to you?

A. The only response was that he wanted a lawyer.

Q. Did you indicate to Agent Parisi that he was to (p. 16) identify himself to Mr. Perkins as a Police Officer?

A. Not until after he was brought over on that Monday, would have been March the 31st.

Q. And at any time did you indicate to Agent Parisi what his role was to be in terms of his conversation with Mr. Perkins?

A. Concerning the conversations inside the jail?

Q. Yes.

A. Nothing other than he was supposed to act as an escaped convict knowing Mr. Charlton, and if any conversation took place between him and Mr. Perkins to relay that information to us.

Q. Did you indicate for Agent Parisi to question Mr. Perkins about the death of Mr. Stevenson?

A. No, ma'am.

Q. What was – what has been Mr. Charlton's compensation for his cooperation with your Police Department?

A. Nothing at all.

Q. And what was Mr. Parisi's compensation by your Police Department for his compensation?

A. Nothing at all.

Q. Why was Agent Parisi selected as the undercover agent to work in this case?

A. Agent Parisi has, I believe, 3-and-a-half years (p. 17) undercover experience. I myself have worked with Special Agent Parisi. He seemed like the logical choice that could talk his way into enhancing his cover, and also he certainly looks the part as a – he looked the part as a biker, motorcycle gang member.

MS. FRANKE: That's all the questions I have of this witness, Your Honor.

THE COURT: You may inquire.

CROSS EXAMINATION
BY MR. JAMES RADCLIFFE

Q. What agency were you working with in March of 1986?

A. Fairview Heights Police Department.

Q. What agency was Mr. Parisi working for?

A. Metropolitan Enforcement Group. I believe he's employed by another agency assigned to that unit.

Q. Is that commonly known as MEGSI?

A. Yes, ma'am. Yes, sir.

Q. So both you and Mr. Parisi were police officers at all times that you've testified to, correct?

A. That's correct.

Q. Can you tell the Court how Mr. Parisi was dressed when you put him in the Hillsboro Jail?

A. I believe he had blue jeans on, ratty T-shirt, (p. 18) motorcycle garb, jacket, on.

Q. Okay. And I believe your testimony was that you and Parisi and who else was involved in setting this up? What other police officers?

A. My Sergeant, Sergeant Prindable, Agent Parisi's supervisor, Special Agent Remelius, and that's all.

Q. Okay. I think the words you used in describing your preparation for this undercover assignment was to develop a ruse, is that the word you used?

A. That's correct.

Q. Can you tell the Judge what the ruse was?

A. Well, obviously when you are dealing with a suspect, you know, suspected of murder, you know we had to use an undercover enhancement or an undercover story that would enhance Mr. Perkins, I mean Mr. Parisi's cover in order for him to engage in some conversation with Mr. Perkins.

Q. So, the purpose of this ruse was for Mr. Parisi as an undercover officer to gain the confidence of the defendant, correct?

A. That's correct.

Q. And, I think you also testified that you never told Mr. Parisi to ask the defendant any questions about the murder?

A. That's correct.

(p. 19) Q. Why were you putting him the cell with him?

A. If any conversation came up that he could overhear that, but he was – he was told not to direct any questions and ask any questions specifically regarding the murder to Mr. Perkins.

Q. Who was to carry out that role, Mr. Charlton?

A. No, Mr. Charlton was told the same thing.

Q. So, the four police officers develop this elaborate ruse to gain the confidence of the defendant and you are telling this Judge that they were directed not to ask any questions of him?

A. That's correct.

Q. Now, you also said there was an eavesdrop order, Court order in effect for Charlton to try to engage the defendant in some telephone conversations at a motel, correct?

A. That's correct.

Q. You are not telling this Court that there was any eavesdrop order in effect for the undercover operation in the jail are you?

A. I don't understand the question.

Q. Well, didn't you talk to Mr. Baricevic about getting an eavesdrop order or wiring up Mr. Parisi to talk to the defendant?

(p. 20) A. The eavesdrop order was still in effect that we had from the Montgomery County State's Attorney's Office regarding Mr. Charlton and Mr. Perkins.

Q. And that eavesdrop order was limited to conversations between Mr. Charlton and the defendant at a motel that you were going to set Charlton up in, correct?

A. I don't know if it was limited to that, no.

Q. Isn't it true that Mr. Baricevic told you that they would not issue an eavesdrop order for any contact between Mr. Parisi, Mr. Charlton, and the defendant at the jail?

A. I don't recall that specifically. I was told –

Q. Well, you told the Judge that you had conversations with Mr. Baricevic?

A. Yes, but you are telling me what he told me. I'm saying that I don't recall him telling me that.

Q. Okay. Would it be fair to say that after your conversation with Mr. Baricevic you did not have an eavesdrop order pertaining to the undercover operation in the jail?

A. No, we did not gather another eavesdrop order, no.

Q. How long was the eavesdrop order in effect that you have from the motel?

A. I believe until April the 5th, 1986.

Q. And none of the – strike that. There were no conversations between Charlton and the defendant during that (p. 21) period of time when you had Charlton set up in the motel, was there?

A. There were no conversations with Mr. Perkins and Charlton at the motel, that's correct.

Q. And how long did you have Mr. Charlton set up at the motel?

A. Well, we attempted to contact Mr. Perkins previously to his going to the motel. Specifically at the motel, I believe we went up there two days.

Q. Okay. What days were – was Charlton set up in the motel, if you recall?

A. I believe it was – I know one of them was Good Friday. I believe it would have been the day before, the day before Good Friday, which would have been the, I believe, the 28th.

Q. 28th. So by the 27th Charlton was taken out of the motel?

A. No. When we got Charlton from the Graham Correctional Facility he was remanded into the custody of the Fairview Heights Police Department. There were numerous attempts to contact Mr. Perkins through the

Fairview Heights Police Department through telephone conversations in order to set up a possible meeting later. Once we were told by Perkins' grandfather that he was out of town, would not (p. 22) return until Friday, at that point we ceased calling the residence, and that Friday we took Mr. Perkins, or Mr. Charlton to the motel in order to try to make contact with him, and have him already in Litchfield.

Q. I'm still trying to figure out when you took Charlton out of the motel. Obviously you did it before the 30th?

A. It was the Friday.

Q. Okay. The 28th?

A. He was brought to the motel, Friday, taken out the same day.

Q. Okay. I take it that it was not part of your ruse to mirandize Mr. Perkins in the jail when Mr. Parisi was undercover, correct?

A. I don't think that would have enhanced his cover, no.

Q. I take it it was not part of the ruse to advise Mr. Perkins that he had a right to an attorney before Mr. Parisi talked to him, was it?

A. As I told, Mr. Perkins was not advised of the rights.

Q. Okay. And in fact you testified that the day after the criminal complaints were signed in this case, Mr. Perkins was arrested and was mirandized, correct?

(p. 23) A. No, the criminal complaint wasn't issued until –

Q. The 31st?

A. No, I believe it was the 1st, if I can refer to my notes. Yes, sir, it was issued April the 1st.

Q. You want to mark that? Handing you what's been marked Defendant's Exhibit No. 1, you recognize that?

A. Yes, sir.

Q. Is that the criminal complaint we are referring to?

A. Yes, sir.

Q. Is that signed March 31st by Judge Hudlin?

A. Yes, sir.

Q. I'm handing you what's been marked Defendant's Exhibit No. 2. Do you recognize that?

A. Yes, sir.

Q. Is that a copy of the warrant of arrest?

A. Yes.

Q. Is that signed by Judge Hudlin also on March 31st, 1986?

A. Yes sir.

Q. Was that the warrant for arrest you used to arrest the defendant?

A. That was the warrant of arrest and criminal complaint was issued late on March 31st. It wasn't filed until

the next day. He was not – he was advised that he was (p. 24) under arrest March 31st. He was not formally served copies of the complaint until April the 1st.

Q. Okay. When he was advised that he was under arrest for the murder of Mr. Stevenson, he was mirandized at that point, correct?

A. That's correct.

Q. And what was his response?

A. That he wished to speak with an attorney.

Q. And he did not make – wish to make a statement, correct?

A. That's correct.

Q. Isn't it true that this entire undercover operation by your department in conjunction with Mr. Parisi working in MEGSI, was initiated by the Fairview Heights Police Department in conjunction with MEGSI?

A. Yes, basically.

MR. RADCLIFFE: That's all I have.

MS. FRANKE: I have no questions.

THE COURT: Step down.

(p. 25) *PATRICK PRINDABLE*

(being called as a witness on behalf of the People, upon being duly sworn, testified as follows)

DIRECT EXAMINATION
BY MS. LISA FRANKE

Q. Would you please state your name and occupation?

A. Patrick J. Prindable, Detective, Fairview Heights Police Department.

Q. How long have you been so employed?

A. Ten years.

Q. Mr. Prindable, directing your attention to the date of November '84, were you so employed with the Fairview heights Police Department on that date?

A. I was.

Q. What were your duties and responsibilities?

A. Head of Investigation Division and assignment of cases.

Q. Were you the supervisor of Agent Walters or Detective Walters during the time he was investigating the death of Mr. Stevenson?

A. I was.

Q. And, subsequent to the initial investigation in the months of March of 1986, were you also involved in the development of a suspect of Lloyd Perkins?

(p. 26)A. Yes, ma'am.

Q. What, if anything, was your initial conversations with Mr. Walters about the suspect Mr. Perkins?

A. Well, we had received some information in regards to a source in the correctional facility up near

Hillsboro, and we went and talked to that source, and that source indicated that he had had a conversation of the subject indicated as Lloyd Perkins. We subsequently initiated an investigation into the possibilities that this suspect in your homicide was Lloyd Ray Perkins.

Q. Who was it that you had the conversation with regarding the development of the suspect of Mr. Perkins?

A. Donald Scott Charlton.

Q. And what, if anything, did Mr. Charlton give you regarding the murder?

A. Well, he indicated that he had had conversation with the Perkins subject and that he had given us information about the homicide that only we felt that only suspect would know.

Q. Were they details which were corroborative of the facts as you knew them to be of the crime scene on the date of the incident?

A. Yes, ma'am.

Q. What did you do with your initial conversation with (p. 27) Mr. Charlton?

A. After the initial conversation we were going to attempt to locate Lloyd Ray Perkins, and what we did is we received an eavesdropping order from Montgomery County and we were going to take Mr. Charlton out of the facility on a writ and try to attempt to connect him with Mr. Perkins up in Litchfield.

Q. At the time that you had received the eavesdrop order is that from the Montgomery County State's Attorney's Office?

A. Yes, ma'am.

Q. Was it from the Montgomery County Court that approved that eavesdrop?

A. Yes.

Q. Why was it you went to Montogomery?

A. Because that was where we were going to try to set up the eavesdrop.

Q. At that time was Mr. Charlton cooperating with you in terms of engaging in that conversation with Mr. Perkins?

A. Yes, ma'am.

Q. At the time that you received the eavesdrop order was it your understanding that Mr. Perkins was not incarcerated, that he was out of the Country Jail?

A. Yes, ma'am.

(p. 28) Q. What, if anything, did you do after receiving the eavesdrop order from Montgomery County Court?

A. After receiving the eavesdrop order, we, Mr. Charlton, try to make contact with Mr. Perkins, and on the 25th of March, we in fact went to Litchfield and set up an eavesdrop in a hotel up there and attempted to have Mr. Charlton contact Mr. Perkins to get him over to the location of our eavesdrop in the motel, and that proved unsuccessful.

Q. What, if anything, did you do after being unsuccessful in that attempt?

A. Well, we took Mr. Charlton back to out facility and we were going to try again, you know, and we tried again several days later, and that was unsuccessful, too.

Q. After that what, if anything, did you do?

A. Well, then we were trying to locate Mr. Perkins and the Montgomery County authorities, particularly Sheriff Moore, and the County Prosecutor knew of our efforts to try and locate Mr. Perkins, and on March 29th, I was contacted at my residence by the Sheriff, Mr. Moore, who advised me that Mr. Perkins was in custody in their facility.

Q. Were you made aware of what he was being held in custody for?

A. Yes, ma'am.

Q. And what was he being held in custody for?

(p. 29) A. Aggravated Battery, I believe.

Q. Was that anything arising out of the charges connected with the death of Mr. Stevenson?

A. No, ma'am.

Q. Were they unrelated charges?

A. Yes, ma'am.

Q. At that time after finding out that information what, if anything, did you attempt to do?

A. I contacted Detective Walters and we had discussed various aspects of what we might do, and we talked about getting John Parisi, and undercover agent for MEG to go up to the county facility in Hillsboro and be processed in with a prisoner along with Mr. Charlton.

Q. At that time did you attempt to acquire an eavesdrop order from the Montgomery County State's Attorney's Office?

A. Yes, but they referred us to the St. Clair County prosecuting attorney.

Q. At that time was your eavesdrop order still in effect in Montgomery County?

A. Yes, ma'am.

Q. Was that conversation for the hotel room that was to be held in the Montgomery County Hotel?

A. Yes, ma'am.

(p. 30) Q. What, if anything, were your conversations with – who was it that you talked to in the St. Clair County State's Attorney?

A. Mr. Baricevic.

Q. And what, if anything, did he indicate to you about an eavesdrop order?

A. He indicated that he did not think we should use an eavesdrop device in the Montgomery County facility.

Q. Did you discuss with him your plans with Agent Parisi?

A. Yes, we did.

Q. And Mr. Charlton?

A. Yes.

Q. What, if anything, did he do?

A. He agreed with our plans to proceed.

Q. Did you do that? Did you proceed with that plan?

A. Yes, ma'am.

Q. Were you present at the date when Mr. Charlton and Mr. Parisi first met with the Fairview Heights Police Department?

A. No, ma'am.

Q. Were you present when they were taken to the Montgomery County Sheriff's Department?

A. No, ma'am.

(p. 31) Q. At any time did you advise Agent Parisi of the details of the homicide of Mr. Stevenson?

A. No, ma'am.

Q. At any time did you direct Agent Parisi to question Mr. Perkins when he came into contact with him about the death of Mr. Stevenson?

A. No, ma'am.

Q. When would be the next contact that you had with Agent Parisi or with Mr. Charlton?

A. That would have been the morning of the 30th, March 30th after the – after they had been incarcerated when they were let out of the facility.

Q. And would that have been a Sunday or a Monday?

A. Monday, I believe.

Q. And what, if anything, did you do at that time?

A. Well, we talked to the – separated Mr. Charlton and Mr. Parisi and we talked to each of them, and each of them indicated that, you know, Mr. Perkins had told them about the incident.

Q. Did you at that time elicit details from both of these witnesses, Agent Parisi and Mr. Charlston?

A. Yes.

Q. Were they consistent with each other?

A. Yes.

(p. 32) Q. Were they consistent with the facts that you knew them to be of the homicide of Mr. Stevenson?

A. Yes, ma'am.

Q. After that, what if anything did you and your department do?

A. At that time we had the Assistant State's Attorney, Mr. Hatch with us, and both Detective Walters and myself brought Mr. Perkins over and we placed him under arrest as a suspect in our homicide and advised him of his rights.

Q. At the time that Agent Parisi and Mr. Charlton went to the Montgomery County Jail and were booked in, was Mr. Perkins under arrest for the death of Mr. Stevenson at that time?

A. No, ma'am.

Q. Had you at that time had any formal documents charging him with that murder?

A. No, ma'am.

Q. What kind of payment did Mr. Charlton receive for his cooperation with you?

A. No, none.

Q. And what kind of compensation did Mr. Parisi receive in exchange for his cooperation?

A. Nothing.

Q. Where you present on the date of the date that Mr. (p. 33) Perkins was formally charged with the murder when he was questioned and advised of his rights?

A. At the Montgomery County Courthouse, yes, ma'am.

Q. And at that time did he give a statement to you?

A. No, ma'am.

Q. What, if anything, was his response?

A. He wanted to talk to a lawyer.

MS. FRANKE: I don't have any further questions of this witness.

CROSS EXAMINATION
BY MR. JAMES RADCLIFFE

Q. Officer Prindable, after you had conversations with Charlton, Mr. Perkins developed as a suspect in the Stevenson killing, isn't that correct?

A. Yes, sir.

Q. And during the period of time that Officer Parisi was undercover in the Hillsboro Jail, the defendant was incarcerated there, isn't that correct?

A. Yes, sir.

Q. He was not free to leave?

A. No – well, I presume not, sir.

Q. I take it he was not mirandized?

A. I wouldn't know, sir, I wasn't there.

(p. 34) Q. You were involved in the discussions with Mr. Parisi prior to going undercover, weren't you?

A. No, sir.

Q. This eavesdrop order that you've referred to, that was specifically for Donald Charlton, isn't that correct?

A. I'd have to refer to my notes, sir.

Q. Is that your recollection?

A. Pardon?

Q. Do you have a copy of it with you?

A. Yes, sir. Says Donald Charlton here.

Q. Okay, does it also refer to setting him up in a motel?

A. Yes, sir, uh-huh.

Q. Does it also refer to telephone conversations?

A. Person-to-person and telephone, yes, sir.

Q. Isn't it true that there is nothing in that eavesdrop order which pertains to the Hillsboro Jail?

A. That is correct.

Q. Isn't it true that there is nothing in that eavesdrop order which pertains to Officer Parisi?

A. That's correct.

Q. You were present when the defendant was arrested on the charge of murder of Mr. Stevenson?

A. Yes, sir.

(p. 35) Q. He was mirandized at that point I take it?

A. Yes, sir.

Q. What was his response?

A. That he wanted to talk to counsel.

Q. And he did not give you a statement, is that right?

A. No, sir.

MR. RADCLIFFE: That's all I have.

MS. FRANKE: I have no further questions.

JOHN PARISI

(being called as a witness on behalf of the People, upon being duly sworn, testified as follows)

DIRECT EXAMINATION BY MS. LISA FRANKE

Q. Would you please state your name and occupation?

A. Special Agent John Parisi. I'm an undercover narcotics agent for the undercover Metropolitan Enforcement Group of Southwestern Illinois.

Q. How long have you been so employed?

A. Three-and-a-half years undercover.

Q. Prior to doing undercover work, what if anything did you do?

A. I was nine years as a Deputy Marshal, Cahokia, Illinois.

(p. 36) Q. Agent Parisi, directing your attention to March of 1986, were you contacted by the Fairview Heights Police Department?

A. I was.

Q. Who were you contacted by?

A. Detective Walters.

Q. And what, if anything, did Detective Walters request of you?

A. He asked me if I would contemplate going into the Montgomery County Jail for a few days, that there was a suspect in there involved in a murder that happened in Fairview Heights.

Q. At that time did he give you any more details about the murder itself?

A. No, he didn't.

Q. And what, if anything, did you indicate to Mr. Walters?

A. I told him I would meet with him that evening and I would be willing to go in the jail.

Q. Did you do that?

A. I did.

Q. Where was it that you first met with Mr. Walters after you conversation?

A. I met with him at the Fairview Heights Police (p. 37) Department.

Q. Who else was present?

A. Donald Charlton.

Q. Did you know Donald Charlton?

A. No, I did not.

Q. Had you met him prior to that day?

A. No, I did not.

Q. What, if anything, was your conversation with Mr. Charlton at that time?

A. At that time Mr. Charlton and I, all we discussed was just a scam that we could lay down that would get us into prison, that would cool us off, make everything okay.

Q. What was the scam?

A. We decided that we'd go in there as inmates that just escaped from the Cook County area up in Chicago on a work release program.

Q. Did you indicate to Mr. Charlton what your name was going to be as your undercover?

A. I did.

Q. What was that?

A. Vito Bianco.

Q. And did you indicate to Mr. Charlton at that time what, if anything, you were going to say to Mr. Perkins when you met him?

(p. 38) A. No, I did not.

Q. Did you discuss with Mr. Charlton at that time the details of what he knew of his previous conversations with Mr. Perkins?

A. No, I didn't. I did see a transcript from the Fairview Heights Police Department, I looked at its briefly, that involved Charlton's testimony.

Q. Did you read it in detail?

A. Not in detail, no.

Q. Were you familiar with its contents prior to talking with Mr. Perkins?

A. No, I wasn't.

Q. What, if anything, did you do after talking with Mr. Charlton?

A. After Charlton and I got – we got our scam together, we were then taken to Hillsboro, Montgomery County, Illinois where we were processed and I was placed into the cellblock.

Q. Do you recall at that time how Mr. Charlton was dressed?

A. I believe in Levis and a shirt.

Q. And how were you dressed at that time.

A. Motorcylce garb.

Q. Can you describe for us what motorcycle garb is?

(p. 39) A. Levis, boots, I had on a black leather jacket with a lot of patches on it, Harley Davidson hat.

Q. What was the process of getting you into the Montgomery County Jail?

A. We were going to go in there stating that we'd committed burglaries down in Hillsboro and we were caught.

Q. Were you processed as a regular inmate would have been?

A. I was photographed.

Q. And, when you entered the cellblock area, can you describe it for us and tell us what it was you first had on when you entered the cellblock area?

A. When I first went in, I had my motorcycle garb on and then before being put into the cellblocks I had to take that off and I was put into an orange jumpsuit.

Q. And, what does that cell inside the Montgomery County Jail look like, is it a large cellblock area like the St. Clair County Jail?

A. It's a large cellblock area. There were approximately, just guessing, approximately twelve cells. None of the doors closed. All of the cells led into a large type room with a table at it.

Q. Would that have been the only cellblock area they had in the Montgomery County Jail?

(p. 40) A. I believe, I'm not for sure, but I believe there was another cellblock area upstairs.

Q. After changing from your motorcycle attire into your jumpsuit, how was it that your were wearing your jumpsuit?

A. I had the pants part on and the top half tied down below my waist.

Q. Was that a usual way of wearing the jumpsuit in the County Jail?

A. Yes, it was, because of the heat.

Q. Is that how Mr. Charlton wore his?

A. Yes, it is.

Q. Had you been told prior to entering the Montgomery County Jail whether you should elicit any conversation from Mr. Perkins regarding the death of Mr. Stevenson?

A. No, not elicit, just basically if we could get into a conversation.

Q. Were you told to question Mr. Perkins about the death?

A. No, not question him.

Q. At that time upon entering the Montgomery County Jail, were you introduced to Mr. Perkins?

A. I was.

Q. How was it that you met him?

(p. 41) A. Through Don Charlton.

Q. And how was the conversation, or how did you meet with him?

A. Once we got into the cellblock, Charlton and Perkins went into a private cell with, I would imagine they exchange greetings, thirty seconds later Charlton called myself into the cellblock, I was introduced to Perkins. We discussed a jail break.

Q. Initially that was you conversation?

A. Yes, it was.

Q. You see Mr. Perkins in the courtroom today?

A. I do.

Q. Can you point him out?

A. He's sitting there with the orange jumpsuit on.

Q. Would that have been the person who you were introduced to in the Montgomery County Jail?

A. It is.

Q. What was your discussion about a jail break at that time?

A. I told Perkins that we had just escaped out of the Cook County area, the Chicago area, and I wasn't going to do any more time, and that I needed to get out of there. Perkins said, you know, that this jail was a rinky-dink jail, that we could break out.

(p. 42) Q. Did he at that time join in your escape plan?

A. At that time he stated that he could have a gun smuggled in, and we decided, the three of us, myself,

Perkins and Charlton, to wait until the rest of the inmates were asleep and then we'd further discuss the plans.

Q. Did you do that?

A. Yes, we did. After we concluded that initial conversation, Perkins then showed myself a make-shift crow bar that was hidden in the bathroom.

Q. Who showed you that?

A. Perkins.

Q. What, if anything, did he say was going to happen with that particular crow bar?

A. He stated that could be used to assist us in the jail break.

Q. What, if anything – how did the conversation proceed at that point?

A. At that point, like I said, we determined to wait until everybody went to sleep. It was just general conversation for the rest of the evening.

Q. Did you meet later on that evening?

A. We did.

Q. Do you have any idea that time it was that you would have met?

(p. 43) A. Can I refer to my report?

Q. I have no objection to that. Jim, do you have any objection?

MR. RADCLIFFE: Go ahead.

A. I'd say approximately 11:30 in the evening, it's hard to tell what time it was, you don't have a watch, there is not clock there.

Q. Who was it that met about 11:30?

A. Myself, Perkins, and the informant.

Q. What, if anything, did you discuss at that time?

A. The three of us went into cell #6, which I believe was Perkins' personal cell. We sat on the floor. We started discussing the jail break again.

Q. How did that conversation proceed?

A. Perkins started out with he could have the .25 automatic slipped in by a girlfriend on visiting day.

Q. And what else happened after he indicated that?

A. We had decided that we would kill anybody that tried to stop us in the jail break. We were going to proceed to go to San Diego, California.

Q. Who was involved in the discussion about killing anybody who was involved in the jail break?

A. Myself, Perkins and Charlton.

Q. Did the conversation ever lead to Mr. Perkins (p. 44) discussing with you the death of a man in the Fairview Heights area?

A. It did.

Q. How did the discussion specifically lead to the information from Mr. Perkins?

A. Once Perkins stated that he could have the .25 automatic slipped into the jail cell, Charlton stated, "Hey,

I'm not a murderer, I'm a burglar. That's your guys' profession."

Q. And?

A. Meaning myself and Perkins.

Q. What was the response at that time?

A. I told the informant if we break out and we have to kill people, that he's involved also. He's an accessory.

Q. And what additionally was said at that time?

A. Well, I asked Perkins, "Have you ever done anybody," meaning have you ever killed anybody.

Q. Was that in the context of the conversation about taking out anybody?

A. Yes, it was.

Q. What was Mr. Perkins' response?

A. He stated yes, he had.

Q. That happened after he indicated that?

A. He stated that he had killed a white guy in a rich (p. 45) area of East St. Louis. Okay. The informant – do you want me to go into the conversation?

Q. Please tell us at that time how the conversation proceeded between yourself, Mr. Charlton, and Mr. Perkins.

A. Is it okay if I refer to my reports?

Q. I have no objection.

MR. RADCLIFFE: Go ahead.

A. The conversation lasted for approximately 35 minutes to the best of my recollection.

"Perkins: I can have a .25 automatic slipped in on visiting day, Tuesday, which would be April 1st, '86.

The Informant: I don't want anything to do with anybody killing anyone."

Q. Would that have been Mr. Charlton?

A. Yes, it was.

Q. Okay.

A. Myself to Charlton: "Once we break out, if we have to kill anyone you are involved.

Charlton: I know, but I don't want to do the killing, I'm a burglar. You guys are the killers."

I then asked Perkins, "You ever do anyone? Yeah, once in East St. Louis, in a rich white neighborhood.

Informant: I didn't know they had any rich white neighborhoods in East St. Louis.

(p. 46) Perkins: It wasn't in East St. Louis, it was by a race track in Fairview Heights. That's about twelve miles from East St. Louis. Did you ever hear of Fairview Heights?" Asking me. I state, "Yes. You did a guy in Fairview Heights?

Perkins: Yeah in a rich white section where most of the houses look the same.

Charlton: If all the houses look the same, how did you know you had the right house?

Perkins: Me and two guys cased the house for about a week. I knew exactly which house, the second house on the left from the corner.

Myself: How long ago did this happen?

Perkins: Approximately about two years ago. I got paid $5,000 for that job.

Myself: How did it go down?

Perkins: I walked up the this guys' house with a sawed-off under my trench coat.

Myself: What type gun.

Perkins: A .12 gauge Remmington Automatic Model 1100 sawed-off. They can't take ballistics from a shotgun. I rang the bell and the guy opened the door a little. It has a chain lock on it. He must have been afraid because his brother got the shit beat out of him a couple days ago with a (p. 47) baseball bat. He motioned for me to go to the garage. He must have thought I was a bum because I was wearing the trench coat.

Myself: How old was the dude?

Perkins: About 40. So the garage door starts to open and I asked the dude are you Steve, and he doesn't answer. So I wait until the garage gets about to his head.

Charlton: What kind of door was it?

Perkins: An automatic garage door. I know because I heard the motor." And then Perkins [started] humming.

"When the door got to his head, I asked him are you Steve. Still he didn't answer. He had one hand

behind his back like he had a gun, so I clicked the safety off an pulled it from under my trench coat and shot him once in the leg. It was loud. Kaboom.

Charlton: Where did you shoot him?

Perkins: In the right leg." Perkins then touched Charlton in the right thigh area with his [hand].

Myself to Perkins: 'What size shells did you use?

Perkins: Shrugs. I don't know what size. So when the dude's going down he called me a son-of-a-bitch. So I ejected the shell and was going to shoot him again, but about three or four little dogs were barking in the garage and the shot made a lot of noise, so I just started running.

(p. 48) Myself: How come you ejected the shell if it was an automatic?

Perkins: When I sawed it off I must have screwed up the gas cylinder.

Informant: I would have been afraid of witnesses.

Perkins: An old lady from across the street came out but I don't think she could recognize me because it was 8:30 at night and it was getting dark.

Myself: So you started running.

Perkins: Yeah, I had to run about three blocks and had to climb about an eight-foot ditch to get to the car.

Myself: How come the car wasn't close?

Perkins: Because we cased the house for about a week before in the car.

Myself: Who had the guy done?

Perkins: One of the guys in the car. He worked with him somehow.

Myself: What did he have him done for?

Perkins: Drugs and sex. He owed him money for drugs and he was fucking his wife. I wasn't supposed to kill him, only cripple him, but he bled to death. Anyway, once I got to the car and was diving away, they were joking that I got the guy's brother and I would have to go back and shoot the right guy. Later we heard on the radio the guy (p. 49) died, and I thought, shit, I got one under my belt now. They asked me how I liked it, killing the guy, and I told them I enjoyed the shit out of it.

Informant: What did you do with the gun?

Perkins: I threw it over a four or five hundred foot cliff as you are going into Litchfield.

Informant: Into a pond?

Perkins: Something like that. Then I burned my trench coat, tennis shoes, and the Levis because they had blood all over them.

Informant: Aren't you afraid the guys in the car will talk? Perkins: No, I trust them with my life. They know I'll get the gas chamber but they will get life. One of the guys in the car said he had to take a lie detector test but he passed it. I've never been questioned on it, but I've got an alibi anyway, because one of the guys – cause me and one of the guys in the car went out that night with some girls. One of the girls was married and I got

into a fight and got barred out of the tavern on purpose. That's it. Never heard anymore about it."

Q. Was that the sum and substance of the conversation that you recalled that you had with Mr. Perkins in the Montgomery County Jail?

A. Yes, ma'am.

(p. 50) Q. After that conversation took place, what if anything did you talk about then?

A. Just usual jailhouse talk. We stayed up for maybe another 15, 20 minutes, watched television.

Q. Did anybody go to bed at that time?

A. Yes, ma'am. Perkins laid down.-Wasn't in the cell, kind of in between the cell and the main room, sleeping on the floor.

Q. And what, if anything, did you and Mr. Charlton do?

A. We stayed up the rest of the night, watched TV, played chess.

Q. What did you do the next morning?

A. The next morning I sent word out that I needed to see the doctor. At that time I was brought out of the cell. I made a phone call to my immediate supervisor, and went back into the cellblock.

Q. What did you indicate to your supervisor?

A. That Mr. Perkins had given me conversation [implicating] him in the crime.

Q. And, after going back in the cellblock, what did you do?

A. I just remained there until my – until nine o'clock when the Sheriff was there to get me out.

Q. Did you leave the cellblock at that time?

(p. 51) A. I did.

Q. What was your excuse for leaving?

A. They were supposed to take me to a different county for another burglary to be arraigned.

Q. At that time did Mr. Charlton also leave with you?

A. He did.

Q. Did you give any instructions at that time to Mr. Charlton?

A. I did.

Q. What did you tell him?

A. I told him to get a piece of paper and pencil and just make notes on what he had heard that evening.

Q. Did you do that also?

A. I did.

Q. And is the sum and substance of your report made from the notes that you would have made immediately after the conversation?

A. It is.

Q. Did you and Mr. Charlton – excuse me, at that time discuss the conversation between yourself and Mr. Perkins and Mr. Charlton?

A. No, ma'am.

Q. Have you and Mr. Charlton ever discussed the details of that conversation?

(p. 52) A. No, ma'am.

Q. Did you compare notes prior to writing your report?

A. No, ma'am.

Q. At any time while you were in the Montgomery County Jail, did you indicate to Mr. Perkins that you were an undercover police officer?

A. No, I did not.

Q. Did you ever advise him of his rights?

A. No, I did not.

Q. Did Mr. Charlton ever advise him of his rights?

A. Not that I'm aware of.

Q. Did Mr. Charlton ever tell him that you were an undercover officer?

A. Not that I'm aware of.

MS. FRANKE: That's all the questions I have.

THE COURT: You may inquire.

CROSS EXAMINATION
BY MR. JAMES RADCLIFFE

Q. Officer Parisi, at all times that you testified to, you were employed as a police officer, isn't that correct?

A. Yes, it is.

Q. And isn't it also true that you and Officer Prindable and Officer Walters and Officer Korunka developed (p. 53) this entire scam?

A. No. sir, it's not.

Q. Who developed it?

A. What scam is that?

Q. To go into the Hillsboro Jail?

A. I was.

Q. As undercover?

A. I was notified by Detective Walters, that's it.

Q. Okay.

A. He's the only person that I met with.

Q. So you and Detective Walters developed the scam, correct?

A. He asked me if I would go into the jail.

Q. Did he tell you that they had received information from Mr. Charlton?

A. He told me that they had received information from an informant that there was somebody that is locked up on Hillsboro that is a suspect in the murder.

Q. And in fact, Detective Walters had a written transcript of his conversation with Mr. Charlton?

A. Yes, he did.

Q. And, in fact, you reviewed that transcript prior to going into the jail undercover, correct?

A. I just briefly skimmed over it.

(p. 54) Q. You recall how many pages it was?

A. No, I don't, I know it was a large one.

Q. When did you review that transcript?

A. Approximately 5:30 that evening.

Q. Which evening?

A. The 30th of March.

Q. When did you go undercover in the jail that evening?

A. I got into the jail, well, we left the Fairview Heights area about 6:30 that evening.

Q. So you had approximately an hour to review the transcript of the interview between Walters and Charlton?

A. That's correct.

Q. So you knew the details of the information that Charlton had relayed to Walters, correct then?

A. No, that's not correct.

Q. You mean you read it and didn't remember anything?

A. I told you I briefly skimmed it over. I was more concerned about a scam getting into jail, a story that's going to work.

Q. Why did you read it?

A. I just wanted to briefly know what was going on.

Q. You wanted the information before you went in there?

(p. 55) A. I wanted to know something about the case, yes.

Q. Okay. Now, part of you scam was to pose as a biker, correct?

A. Yes, sir.

Q. Identify yourself as Vito Bianco?

A. Correct.

Q. To tell the defendant that you were being held on a series of burglaries?

A. Correct.

Q. Tell the defendant that you were involved in a jail break in the Cook County area?

A. Out of a work release program. That's not a jail break, sir.

Q. Excuse me. Also to tell the defendant that you wanted to break out of the Hillsboro Jail, correct?

A. Correct, uh-huh.

Q. None of those things were true, were they?

A. No, sir. Well –

Q. The whole object of this scam was to engage the defendant in a conversation regarding the killing of Mr. Stevenson, correct?

A. No, to see if he would say anything about it.

Q. The whole object of the scam was tc see if the defendant would give you information regarding that homicide, (p. 56) correct?

A. Well, you could – yes, okay, I'll give you that one.

Q. Thank you. And, in fact, the conversation that you say you elicited from the defendant was initiated by your question as to whether or not he had ever done anybody, correct?

A. Correct.

Q. You were involved in the conversations with the defendant at all times in the presence of Mr. Charlton, correct?

A. Correct.

Q. At no time were you identified as a police officer?

A. No.

Q. At no time was he mirandized?

A. No.

Q. Did you have any other involvement with this case subsequent to March 31st, 1986?

A. No, I did not.

MR. RADCLIFFE: That's all I have.

MS. FRANKE: I have no questions.

THE COURT: Step down.

MS. FRANKE: Your Honor, I need to get the last witness from the holdover cell.

(p. 57) THE COURT: All right.

MS. FRANKE: Your Honor, he's in leg irons and handcuffs, would you like him out of those?

THE COURT: Yeah, take them off.

MR. RADCLIFFE: I won't vouch for Mr. Charlton Your Honor.

THE COURT: Okay. I will. Bailiff, wake up, and if he starts to move, shoot him.

DONALD CHARLTON

(being called as a witness on behalf of the People, upon being duly sworn, testified as follows)

DIRECT EXAMINATION

BY MS. LISA FRANKE

Q. Would you please state your name?

A. Donald Charlton.

Q. And how old are you?

A. Twenty-seven.

Q. Are you presently serving a prison sentence?

A. Yes.

Q. In the State of Illinois?

A. Yes.

Q What is that for?

A. Burglary.

(p. 58) Q. And how long were you sentenced to?

A. Six years.

Q. What county did that originate out of?

A. Lawrence.

Q. And, when you first received your sentence, where did you serve your time?

A. Graham Correctional Center.

Q. And how long were you at Graham Correctional Facility?

A. Approximately a year.

Q. And after Graham where did you go?

A. Centralia.

Q. During the time that you were at Graham Correctional Facility, did you meet with a man by the name of Lloyd Perkins?

A. I did.

Q. Do you see Mr. Perkins here today?

A. Yes.

Q. Is he sitting at the counsel table in the orange jumpsuit?

A. Yes.

Q. What kind of relationship did you have with Mr. Perkins?

A. We were friends in a cellblock.

(p. 59) Q. And approximately how long did you know him or were you in the same cellblock area together?

A. The first time I was in receiving for maybe six weeks with him and the second time a couple months in another unit.

Q. During the course of the time that you had contact with Mr. Perkins, did you ever engage in a conversation regarding any murder or a death of an individual in the Fairview Heights area?

A. Yes, at the time I didn't know it was Fairview Heights at the time, but we discussed a murder and a death.

Q. What was his initial conversation to you about that death?

A. He told me that he had killed somebody for $5,000, he told me the details and that he'd done it.

Q. Did you ever relay that information to any state agency or any state authority?

A. I contacted someone I know in the Spokane Police Department, who in return contacted Ken Korunka of the State Police.

Q. Spokane being Spokane, Washington?

A. Yes.

Q. Why did you make a contact with them?

A. I'm from Spokane, Washington, and I have a friend (p. 60) who's a detective there.

Q. And he referred you to Agent Korunka?

A. Yes.

Q. Did you at that time discuss with Agent Korunka the details of the murder that Mr. Perkins had talked with you about?

A. Yes.

Q. What was your reason for relaying the information to the authorities?

A. People shouldn't kill people.

Q. Did you have any desire at that time to work a deal with anybody regarding your sentence?

A. No, ma'am.

Q. And has any compensation been given to you for cooperating?

A. No.

Q. Have you received any deal for your cooperation within this case?

A. No.

Q. After talking with Agent Korunka, had you agreed to talk with Agent Waiters or Detective Walters?

A. He told me that somebody – he just said that another police agency wanted to talk to me.

Q. Did you a agree to talk with them?

(p.61) A. Yes.

Q. Did you later learn that person would be Detective Walters?

A. Yes.

Q. Did you have a conversation with Detective Walters?

A. Yes.

Q. And when would that have been?

A. Some time in March.

Q. Of 1986?

A. Yes.

Q. And at that time did you relate to Agent Walters the details that you knew about the homicide?

A. Yes.

Q. The details that you gave the Agent Walters at that time, where had you learned those from?

A. From Mr. Perkins at Graham Correctional Center.

Q. Did you agree at that time to cooperate further with Agent Walters in pursuing the investigation with Mr. Perkins?

A. Yes.

Q. What did you agree to do?

A. To wear a wire and try to get Mr. Perkins to give me the conversation on tape.

Q. And where did you understand that that conversation (p. 62) was to take place?

A. In a motel room.

Q. And did you have any idea what county that was going to happen in?

A. In his home town in Montgomery County.

Q. Did that conversation in the motel room ever happen with Mr. Perkins?

A. No, it did not.

Q. Did you make phone calls to attempt contact with Mr. Perkins?

A. Yes, several – yes.

Q. Would that have been when you were on a writ to the Fairview Heights Police Department?

A. Yes.

Q. Where you successful in making contact with Mr. Perkins at that time?

A. No, I was not.

Q. Did you ever later agree to enter the Montgomery County Jail to engage in a conversation with Mr. Perkins at that location?

A. Yes, I did.

Q. Were you told at that time that you would be accompanied by another agent?

A. Yes.

(p. 63) Q. And, did you later learn that agent to be Agent Parisi?

A. Yes.

Q. When would have been the first time you ever met Agent Parisi?

A. Well, when Walters brought it to me that we were going to go into jail, I mentioned to him that he didn't look a lot like an inmate, and he told me that they had someone else. And the night before we went in there, no, the same day that we went in there on a Sunday, I met with Mr. Parisi.

Q. Had you ever met Agent Parisi before that date?

A. I have not, no.

Q. And at that time what was your conversation with Agent Parisi?

A. We went through the details of how our story of escaping from work release, and I was – that was it.

Q. Okay. What were the details of how you were going to explain your presence in the Montgomery County Jail?

A. That I'd been sent to work release in the Chicago area and that Vito, which is Agent Parisi, Vito and I were in the work release together, we had escaped from work

release, came down to Montgomery County to meet Lloyd and take him back with us to California. Why we were there, we couldn't contact him; we ran out of money; we were in the process of a (p. 64) Burglary, and were arrested.

Q. Did you relay at that time any of the details of what Mr. Perkins had told you about the murder to Agent Parisi?

A. No.

Q. What were you told about engaging in a conversation with Mr. Perkins about the death of this person who he had allegedly murdered?

A. I was told introduce Vito to him, try to get him alone, get the conversation going, leave no information out, and let Perkins do most of the talking, and just make the introduction as much as I could.

Q. When you got to the Montgomery County Jail, were you processed in as an inmate?

A. Yes.

Q. What did you have on when you initially got there?

A. A jumpsuit. Well, when I first got there I had jeans and a work shirt.

Q. And what did Agent Parisi have on?

A. He had on a bikers outfit, a leather jacket with patches, chain belt, jeans, Harley Davidson wallet.

Q. Did you later change from that outfit to something else?

A. Yes.

(p. 65) Q. What did you put on?

A. Jumpsuit.

Q. How was it that Agent Parisi first met Mr. Perkins?

A. We were processed into the jail. It was a small cellblock. We went in, Lloyd and I said hello. We, Lloyd and I went into a separate little cell. We were there 30 seconds and I called Vito in, introduced him as my partner who escaped from work release.

Q. Did he immediately recognize you?

A. Yes.

Q. Did you immediately know who he was?

A. Yes.

Q. In terms of Perkins?

A. Yes.

Q. How many other cellmates were there in that area at that time?

A. Four or five, I can't remember.

Q. Did you know anyone else?

A. No.

Q. Did Parisi know anybody?

A. No.

Q. How did the conversation progress after you introduced Agent Parisi to Perkins?

A. We told him about the escaping from work release (p. 66) and what not. We all said that we were in big trouble and we had to get out of there and that we were planning an escape.

Q. What was Perkins' response to that?

A. Oh, we were all three agreed to it.

Q. Okay. What did you decide to do after your initial conversation about the escape?

A. There was iron bar about three feet tall and about 10 pounds, wide, 6 inches. We were going to take the iron bar. The jailer was an elderly man, old guy, supposed to have been there all alone. We were going to take him, get him to open the door, take him hostage, get out in the jail part and take guns.

Q. Who provided the instrument that you are talking about?

A. Mr. Perkins.

Q. And who had suggested taking the older man into the cell area, take him as hostage?

A. Mr. Perkins.

Q. Did he appear to be familiar with the operations of the Montgomery County Jail at that time?

A. Yes.

Q. What, at that time, did you decide to do?

A. We at that time decided that we should wait until tomorrow morning and wait until everybody else was asleep to (p. 67) talk about it.

– Q. Did you do that?

A. Yes. We watched TV in between.

Q. About what time would it have been that you again began the conversation of the jail break?

A. It was a little after midnight.

Q. And –

A. Approximately, I'm not sure exactly.

Q. Who would have been present during that second conversation?

A. Mr. Parisi, Mr. Perkins and myself went into a back cell where Mr. Perkins was alone.

Q. Was there anybody else in the cellblock at that time engaged in this conversation?

A. No, they were all –

Q. At that time what was the conversation between the three of you?

A. We, at that time, all three of us were in the back room, back cell. We talked about the escape. I told Perkins that Vito and him were in the same business, and that when we got out of there, once we had escaped we were going to California. Vito and him could do business in California.

Q. How did the conversation progress after that?

A. Vito asked him if he had ever done anyone.

(p. 68) Q. Being – he asked Perkins?

A. Right.

Q. What was Perkins' response?

A. He said I shot a man in the leg.

Q. And, now did the conversation proceed after that?

A. Parisi asked him how he had done it. Mr. Perkins told him that, told all of us, both of us, that he had went up to the front door with a green trench coat on, knocked on the door. The man opened the door with a little chain on it. Said just a minute, went around to open the garage door. When he came out the garage door he had one hand behind his back. Perkins said he lifted the shotgun from underneath the coat and shot him. Shot him in the leg.

Q. Did he indicate to you at that time how the garage door became open?

A. I asked him if he had one hand on the garage door that wasn't beside his back. He said he heard an electric garage door opener.

Q. Did he indicate to you at that time that he had any conversation with the individual who was at the garage door?

A. He asked him if his name was Steve.

Q. And, did he have any other conversation with the man at that time?

A. The guy said – didn't answer him, and he asked him (p. 69) again if his name was Steve, and at that time he said he just shot him, and as the guy was falling called

him, the victim called him a son-of-a-bitch as he was falling.

Q. What, if anything, did Perkins tell you happened after that?

A. He said that – well, I asked him, because he told me in prison that there was an old lady across the street. I said weren't you worried about the old lady across the street. He said no, I was running down the street, it was late, it was getting dark, and I don't think she saw me.

Q. Did he indicate to you at that time how he left the area?

A. He said that they – Parisi asked him if he parked the car close. He said that they parked it about a block away because they had been casing the place for about a week and they were worried someone in the neighborhood would spot the car, and that they had parked a block away, and that he had to climb 8 to 12-foot ditch.

Q. Did he indicate to you anything about what kind of weapon he used and whether there were any shells or casings left at the scene?

A. Yeah. He said it was an automatic shotgun, and he mentioned that he had to eject a shell, and I asked him, I said it's an automatic, you don't need to eject an automatic (p. 70) shell. He said it had been cut down and because of the gas chamber had been cut, it had to be ejected manually. He said when he saw the lady he had ejected the shell into the street while he was running.

Q. Was that pretty much the conversation as you recall it between the three of you that evening?

A. He told us that he got 2500 down to do it, 25 after.

Q. And did he indicate to you why he was to injure this particular person?

A. The people that hired him, he said, told him it was over a woman and something to do with drugs, he thought.

Q. After that part of the conversation, what if anything did the three of you discuss?

A. Pretty much we went back to – talked about the escape a little more, and that was it.

Q. Did you and Agent Parisi stay up the rest of the evening?

A. Yeah, one us was awake at all times.

Q. At that time did you, after – did Mr. Perkins go to sleep?

A. Yeah.

Q. Did the two of you discuss the details of the conversation that you had heard with Mr. Perkins at that (p. 71) time?

A. No. Parisi and I went and in the same cell, upper bunks for about twenty minutes and we laid down, and then I said to Parisi, I said, you know, with that iron bar out there, there is no way in hell that I'm sleeping in here. I said I'm going – Mr. Perkins was on the floor out by the TV. I said I'm going to go out there and keep an eye on him. I said one of us should be up at all times. I

went out in the dayroom, put a mattress on the floor, and watched TV all night.

Q. The next day Agent Parisi was taken and the two of you were eventually taken from the Montgomery County Jail?

A. Yes.

Q. Were you given any directions by Parisi at that time?

A. He put me in a room and told me to take notes of everything I could remember.

Q. Were the two of you together when you were taking the notes?

A. Part of the time but there was a Sheriff there, also.

Q. Did you compare notes about what had happened?

A. No, I even asked him a few questions, and he wouldn't answer me. He said just write down what I (p. 72) remembered.

Q. So you would not have discussed with him prior to making your notes, any discussion that you would have had with Mr. Perkins?

A. No.

Q. Have the two of you since then discussed what you recall of the conversation that was in the cellblock that night?

A. No.

MS. FRANKE: That's all the questions I have.

THE COURT: Jim?

CROSS EXAMINATION
BY MR. JAMES RADCLIFFE

Q. Mr. Charlton, why did you contact this guy out in Spokane, Washington, with this information?

A. Because he's the only person that I know in law enforcement.

Q. You are from that area, aren't you?

A. Yes, I am.

Q. Did you have any pending charges out there at the time?

A. No.

Q. Did you request your friend in Spokane to talk to (p. 73) the local officials see if they could relax some of the criminal pressure on you in this area?

A. In this area?

Q. Yeah.

A. I have no criminal pressure in this area.

Q. You are in jail, aren't you?

A. Yeah, but I've been sentenced.

Q. Did you have any discussions with any of the local police officers about dealing your information about the defendant for consideration on any of the pending charges?

A. I did, and they said that they would make me no deals.

Q. Did they – isn't it true they told you they would try to talk to people for you?

A. They said that they would make me no deals, that the prosecutor said there was no deals.

Q. You gave a lengthy tape recorded conversation and statement to Detective Walters, didn't you, on March 14th?

A. I believe that's the date.

Q. Were you aware that Officer Parisi had reviewed that prior to you and he going into the jail to try to engage the defendant in conversations?

A. I was not.

Q. Officers Parisi was involved in questioning the (p. 74) defendant during the period of time that he was undercover in the jail with you, isn't that correct?

A. I don't know if it was questioned.

Q. He was involved in the conversation?

A. He was involved in the conversation, yes.

Q. Didn't he initiate the conversation by asking the defendant if he had ever done anybody?

A. Well, I initiated it by saying they were in the same business.

Q. What business was that?

A. Killing people.

Q. I take it Vito was not in that business at the time you told the defendant that, was he?

A. No.

Q. At any time during the period of time that you were in the cellblock with Officer Parisi and the defendant, did Officer Parisi ever advise the defendant as to his Miranda rights?

A. No.

Q. Did he ever identify himself as a police officer?

A. No.

Q. Who concocted this undercover scam?

A. About the work release?

Q. No, about the whole deal, work release, jail break, (p. 75) calling himself Vito Bianco, who put that all together?

A. I assume the Fairview Heights Police and Vito.

Q. Were you involved in their discussions?

A. Very little.

Q. Who was present when you had discussions with them?

A. Just me and Walters and Prindable.

Q. And Parisi?

A. No, I only met Parisi that night.

Q. Okay.

MR. RADCLIFFE: That's all I have.

MS. FRANKE: I have no other questions.

THE COURT: Step down.

* * *

No. 88-1972

Supreme Court, U.S.
FILED
NOV 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

LLOYD PERKINS,

Respondent.

On Writ of Certiorari To The Appellate Court Of Illinois, Fifth Judicial District

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Petition for Writ of Certiorari Filed June 2, 1989
Certiorari Granted October 2, 1989

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92 pp

QUESTION PRESENTED

Whether questioning by an undisclosed undercover agent constitutes *per se* custodial interrogation as contemplated by *Miranda* merely because the suspect is incarcerated?

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The opinion of the Appellate Court of Illinois, Fifth Judicial District, is set forth at page 1a of the Petition for Writ of Certiorari and is reported at *People v. Perkins*, 176 Ill. App. 3d 443, 531 N.E.2d 141 (5th Dist. 1988). The order of the Circuit Court of the 20th Judicial Circuit, St. Clair County, Illinois, is reproduced at page 11a of the petition and is not reported.

JURISDICTION

The judgment of the Appellate Court of Illinois, Fifth Judicial District, was entered on November 21, 1988, affirming the lower court's pretrial suppression of evidence on April 8, 1987. No petition for rehearing was filed and a timely petition for leave to appeal to the Illinois Supreme Court was denied on April 5, 1989. The Petition for Writ of Certiorari was filed June 2, 1989, and certiorari was granted October 2, 1989.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Respondent was charged in the Circuit Court of the 20th Judicial Circuit, St. Clair County, Illinois, with the November 8, 1984, murder of Richard Stephenson. (C. 24) Prior to trial, he filed two Motions to Suppress, alleging that inculpatory statements he had made were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and the Fifth and Sixth Amendments. (J.A. 6-8)

At the hearing on respondent's motions before the Honorable John J. Hoban, it was established that 16 months after the initiation of a fruitless investigation into Stephenson's Fairview Heights, Illinois, murder, respondent was implicated in the crime by Donald Charlton. (J.A. 12-13, 62-63) Charlton, who was serving a 6-year sentence for burglary, had become friends with respondent during their incarceration together for 3½ months at the Graham Correctional Center in Hillsboro, Montgomery County, Illinois. (J.A. 61-62) At that time, respondent detailed for Charlton how two years before he had killed somebody in the East St. Louis area for $5,000. (J.A. 12, 62) Because Charlton believed that "[p]eople shouldn't kill people", he contacted a detective in the Spokane, Washington, Police Department who was his only acquaintance in law enforcement. (J.A. 63, 75) The detective in turn contacted an agent of the Illinois State Police, who passed the information along to the Fairview

Heights Police Department on March 4, 1986. (C. 10; J.A. 12, 63)

Fairview Heights Police Officer Stephen Walters, case agent on the Stephenson murder, conducted a background check on Charlton and held a taped interview with him at the Graham facility on March 14, 1986 (J.A. 11-13, 64, 76) Though he was told that authorities would make him no "deals" in exchange for his information, Charlton agreed to cooperate. (J.A. 22, 37, 63-66, 75-76) The information he provided significantly corroborated that which had surfaced during the initial investigation. (J.A. 12-13, 31)

When it was learned that respondent had been released from Graham Correctional Center on March 5, Charlton agreed to attempt communication with respondent while being monitored by an eavesdrop device. (J.A. 13, 64-65) Court orders authorizing Charlton's release from Graham and the use of electronic surveillance were obtained, and by March 25 the numerous efforts to contact respondent at his home in the Litchfield area had begun. (J.A. 13-14, 25-27, 31-33, 38-39, 65) At some point, his grandfather informed that respondent was out of town and would not return until Good Friday, March 28. (J.A. 26-27)

The following Saturday, March 29, Fairview Heights police were advised that respondent was being held at the Montgomery County Jail in Hillsboro on aggravated battery charges unrelated to the Stephenson murder. (J.A. 15, 33) Because they feared that the use of an eavesdrop device in the jail would prove impracticable and unsafe, Officer Walters and his supervisors determined that

undercover narcotics Agent John Parisi of the Metropolitan Enforcement Group should be incarcerated along with Charlton as a ruse to gain respondent's confidence. (J.A. 15-16, 23-24, 33-34, 40) At 5:30 p.m. Sunday, Walters, Parisi, and Charlton met to develop the story that Charlton and Parisi had escaped from a work release program, traveled to the Litchfield area to meet respondent, run out of money, committed burglaries, been arrested, and been thrown into jail. (J.A. 18, 41, 57, 66-67) Parisi briefly skimmed a transcript of Charlton's March 14 interview with Walters, but was unfamiliar with the details of the Stephenson murder. (J.A. 17-19, 35, 40, 42, 57-58, 67) Neither Parisi nor Charlton was told to question respondent about the murder, but just to engage him in conversation and relay any information obtained. (J.A. 17, 21-22, 24, 35, 44, 67)

At 8:10 p.m. Sunday night, Parisi and Charlton were placed in a cellblock of the Montgomery County Jail which contained four to five inmates and approximately twelve open cells leading to a larger room with a table. (J.A. 19, 43, 66, 68) Upon seeing each other, Charlton and respondent greeted and entered a private cell. (J.A. 45, 68) Thirty seconds later, Charlton called Parisi into the cell and introduced him as "Vito" to respondent. (J.A. 42, 45, 68) Parisi told respondent that they had just escaped from a work release program in the Chicago area, that he wasn't going to do any more time, and that he "needed to get out of there." (J.A. 45, 69) Respondent replied that the jail was "rinky dink", that he could have a gun smuggled in, and that the jailor was an elderly man who would be

alone and could be taken hostage. (J.A. 45, 69) Respondent then showed Parisi a crowbar hidden in the bathroom which could be used in the jail break. (J.A. 46, 69) The three decided to postpone further planning until the other inmates were asleep. (J.A. 46, 69)

At approximately 11:30 p.m., Parisi, Charlton and respondent met alone in the latter's back cell. (J.A. 47, 70) Respondent started out by saying he could have a .25 automatic pistol slipped in by his girlfriend on visiting day. (J.A. 47) Charlton responded "Hey, I'm not a murderer, I'm a burglar. That's your guys' profession." (J.A. 47-48, 70, 76) Parisi then asked if respondent had ever "done anybody", to which he replied affirmatively. (J.A. 48, 70-71) Parisi testified as follows from his notes summarizing the 35 minute conversation held with respondent:

> A. "Perkins: I can have a .25 automatic slipped in on visiting day, Tuesday, which would be April 1st, '86.
>
> The Informant: I don't want anything to do with anybody killing anyone.
>
> Q. Would that have been Mr. Charlton?
>
> A. Yes, it was.
>
> Q. Okay.
>
> A. Myself to Charlton: "Once we break out, if we have to kill anyone you are involved.
>
> Charlton: I know, but I don't want to do the killing, I'm a burglar. You guys are the killers.
>
> I then asked Perkins, "You ever do anyone? Yeah, once in East St. Louis, in a rich white neighborhood.

Informant: I didn't know they had any rich white neighborhoods in East St. Louis.

Perkins: It wasn't in East St. Louis, it was by a race track in Fairview Heights. That's about twelve miles from East St. Louis. Did you ever hear of Fairview Heights?" Asking me. I state, "Yes. You did a guy in Fairview Heights?

Perkins: Yeah in a rich white section where most of the houses look the same.

Charlton: If all the houses look the same, how did you know you had the right house?

Perkins: Me and two guys cased the house for about a week. I knew exactly which house, the second house on the left from the corner.

Myself: How long ago did this happen?

Perkins: Approximately about two years ago. I got paid $5,000 for that job.

Myself: How did it go down?

Perkins: I walked up to this guys' house with a sawed-off under my trench coat.

Myself: What type gun.

Perkins: A .12 gauge Remington Automatic Model 1100 sawed-off. They can't take ballistics from a shotgun. I rang the bell and the guy opened the door a little. It had a chain lock on it. He must have been afraid because his brother got the shit beat out of him a couple days ago with a baseball bat. He motioned for me to go to the garage. He must have thought I was a bum because I was wearing the trench coat.

Myself: How old was the dude?

Perkins: About 40. So the garage door starts to open and I ask the dude are you Steve, and he doesn't answer. So I wait until the garage gets about to his head.

Charlton: What kind of door was it?

Perkins: An automatic garage door. I know because I heard the motor." And then Perkins [started] humming.

"When the door got to his head, I asked him are you Steve. Still he didn't answer. He had one hand behind his back like he had a gun, so I clicked the safety off and pulled it from under my trench coat and shot him once in the leg. It was loud. Kaboom.

Charlton: Where did you shoot him?

Perkins: In the right leg." Perkins then touched Charlton in the right thigh area with his [hand].

Myself to Perkins: "What size shells did you use?

Perkins: Shrugs. I don't know what size. So when the dude's going down he called me a son-of-a-bitch. So I ejected the shell and was going to shoot him again, but about three or four little dogs were barking in the garage and the shot made a lot of noise, so I just started running.

Myself: How come you ejected the shell if it was an automatic?

Perkins: When I sawed it off I must have screwed up the gas cylinder.

Informant: I would have been afraid of witnesses.

Perkins: An old lady from across the street came out but I don't think she could recognize me because it was 8:30 at night and it was getting dark.

Myself: So you started running.

Perkins: Yeah, I had to run about three blocks and had to climb about an eight-foot ditch to get to the car.

Myself: How come the car wasn't close?

Perkins: Because we cased the house for about a week before in the car.

Myself: Who had the guy done?

Perkins: One of the guys in the car. He worked with him somehow.

Myself: What did he have him done for?

Perkins: Drugs and sex. He owed him money for drugs, and he was fucking his wife. I wasn't supposed to kill him, only cripple him, but he bled to death. Anyway, once I got to the car and was driving away, they were joking that I got the guy's brother and I would have to go back and shoot the right guy. Later we heard on the radio the guy died, and I thought, shit, I got one under my belt now. They asked me how I liked it, killing the guy, and I told them I enjoyed the shit out of it.

Informant: What did you do with the gun?

Perkins: I threw it over a four or five hundred foot cliff as you are going into Litchfield.

Informant: Into a pond?

Perkins: Something like that. Then I burned my trench coat, tennis shoes, and the Levis because they had blood all over them.

Informant: Aren't you afraid the guys in the car will talk? Perkins: No, I trust them with my life. They know I'll get the gas chamber but they will get life. One of the guys in the car said he had to take a lie detector test but he passed it. I've never been questioned on it, but I've got an alibi anyway, because one of the guys – cause me and one of the guys in the car went out that night with some girls. One of the girls was married and I got into a fight and got barred out of the tavern on purpose. That's it. Never heard anymore about it."

(J.A. 49-53) Charlton provided a corroborative account of the conversation, adding that respondent said he had received $2,500 as downpayment. (J.A. 71-73)

Subsequent to respondent's admissions, the three again talked about the escape and watched television until respondent went to sleep on the floor between his cell and the dayroom 15-20 minutes later. (J.A. 53, 73) Because Charlton did not trust respondent with the crowbar, he stayed up the rest of the night watching television and playing chess with Parisi. (J.A. 53, 73-74) At 9:00 a.m. Monday morning, Parisi and Charlton were taken out of the cellblock (J.A. 35, 53-54) Parisi told Charlton to prepare notes on everything they had heard, but the two did not compare their recollections with one another. (J.A. 36, 54-55, 73-74) Respondent's admissions were consistent with facts authorities had developed in their investigation of Stephenson's murder. (J.A. 36)

Officer Walters placed respondent under arrest for Stephenson's murder Monday, March 31, after he was brought over to the courthouse from the jail. (J.A. 19-21,

36-37) At that time respondent was given *Miranda* warnings and requested a lawyer. (J.A. 29, 37) The criminal complaint and arrest warrant were signed late March 31st and filed on April 1. (C. 2; J.A. 4-5, 21, 28-29)

Based upon the above facts, petitioner argued, *inter alia*, that respondent was not subjected to custodial interrogation so as to trigger *Miranda*. (C. 79-80) On April 8, 1987, the Honorable Richard A. Hudlin IV entered an order prohibiting Parisi and Charlton from testifying to respondent's Montgomery County Jail statements because he was questioned by governmental agents while in custody and without being given *Miranda* warnings. (C. 69)

On petitioner's pretrial appeal pursuant to Ill. Rev. Stat. 1987, ch. 110A, para. 604(1), the sole issue raised was whether *Miranda* was violated. In a decision issued November 21, 1988, the Appellate Court of Illinois, Fifth Judicial District, held that *Miranda* prohibits all undercover contacts with incarcerated suspects which are reasonably likely to elicit an incriminating response. *People v. Perkins*, 176 Ill. App. 3d 443, 531 N.E.2d 141 (5th Dist. 1988). The Illinois Supreme Court denied petitioner leave to appeal April 5, 1989.

SUMMARY OF THE ARGUMENT

A. In order to dispel the inherently compelling pressures of custodial interrogation, *Miranda v. Arizona*, 384 U.S. 436 (1966), created prophylactic safeguards for the Fifth Amendment privilege against compulsory self-incrimination which ensure that any waiver of the

privilege will be both voluntary and knowing. These safeguards, however, serve to frustrate law enforcement's legitimate efforts in securing statements through constitutionally permissible means. Accordingly, *Miranda* "does not apply outside the context of inherently coercive interrogations for which it was designed." *Roberts v. United States*, 445 U.S. 552, 560 (1980). If an inmate is unaware that he is communicating with a government agent, the most significant source of potential coercion identified by *Miranda* – mutually reinforcing manifestations of police dominance – does not exist. Nor could pressures arise from a perception that the agent directly influences any other facit of governmental power. Because the undercover technique significantly mitigates the pressures which may come to bear on a suspect to speak, application of *Miranda* is unwarranted.

B. Even if *Miranda* could be properly invoked to prohibit some undercover scenarios, respondent was not subjected to custodial interrogation here because the record affirmatively establishes that his statements were elicited without compelling pressures which could potentially have arisen from incarceration and questioning.

ARGUMENT

MIRANDA DOES NOT PROHIBIT THE USE OF UNDERCOVER AGENTS TO ELICIT STATEMENTS FROM INCARCERATED SUSPECTS PARTICULARLY WHERE, AS HERE, THE ENCOUNTER IS DEVOID OF COMPELLING INFLUENCES.

This Court has not resolved the question of whether *Miranda v. Arizona*, 384 U.S. 436 (1966), applies in full

force when undercover agents initiate conversations with incarcerated suspects.[1] However, in finding that the Sixth Amendment right to counsel prohibits the use at trial of post-indictment statements deliberately elicited by an informant, this Court in *United States v. Henry*, 447 U.S. 264 (1980), left unmodified it's position in *Hoffa v. United States*, 385 U.S. 293 (1966), that the Fifth Amendment is not "implicated by the use of undercover Government agents before charges are filed because of the absence of the potential for compulsion." *Henry*, 447 U.S. at 272. Further, this Court in *Michigan v. Jackson*, 475 U.S. 625, 632 (1986), observed that the surreptitious employment of a cellmate may violate the Sixth Amendment right to counsel "even though the same method[ ] of investigation

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[1] The lower court here held *Miranda* to prohibit all undercover activities which authorities should know are reasonably likely to elicit incriminating responses from an inmate. *People v. Perkins*, 176 Ill. App. 3d 443, 531 N.E.2d 141 (5th Dist. 1988). *See also State v. Fuller*, 204 Neb. 196, 281 N.W.2d 749 (1979); *State v. Travis*, 360 A.2d 548 (R.I. 1976); *Holyfield v. State*, 711 P.2d 834 (Nev. 1985); *State v. Calhoun*, 479 So.2d 241 (Fla. App. 4th Dist. 1985); *State v. Perkins*, 753 S.W.2d 567 (Mo. App. 1988); *United States v. Brown*, 466 F.2d 493 (10th Cir. 1972). *Contra People v. Williams*, 44 Cal.3d 1127, 751 P.2d 901, *cert. denied*, ___ U.S. ___, 109 S.Ct. 514 (1988) (*Miranda* inapplicable to conversations between inmates and undercover agents); *State v. McDonald*, 387 So.2d 1116 (La.), *cert. denied*, 449 U.S. 957 (1980) (same where encounter not "intimidating"); *People v. Aalbu*, 696 P.2d 796 (Colo. 1985) (en banc) (same); *United States v. Willoughby*, 860 F.2d 15 (2nd Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 846 (1989) (same). Without citing *Willoughby*, the second circuit subsequently held that *Miranda* prohibits an inmate's "friend" from offering to dispose of incriminating evidence. *Alexander v. State of Connecticut*, 876 F.2d 277 (2nd Cir. 1989), *petition for cert. filed* (U.S. Sept. 25, 1989) (No. 89-510).

might have been permissible before arraignment or indictment." Finally, in noting that the definitions of "interrogation" under the Fifth and Sixth Amendments are not necessarily interchangeable due to the distinct policies underlying the two constitutional protections, this Court in *Rhode Island v. Innis*, 446 U.S. 291, 300, n. 4 (1980), cited Kamisar, *Brewer v. Williams, Massiah* and *Miranda*: What is "Interrogation"? When Does it Matter?, 67 Geo L.J. 1 (1978), which argues that *Miranda* should not be automatically invoked to prohibit the use of undercover agents in eliciting incriminating statements from incarcerated suspects. *See also* Note, *Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the* Innis *Definition Of Interrogation*, 87 Mich. L.R. 1073 (1989) (questioning of inmate by undisclosed government agent outside scope of *Miranda*). It is petitioner's position that application of *Miranda* in the context of any undercover investigation would sacrifice effective law enforcement techniques in the name of a constitutional guarantee which has not likely even been jeopardized. Clearly more unwarranted is the lower court's application of *Miranda* to facts affirmatively demonstrating the absence of any compelling influences which could have come to bear on respondent.[2]

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[2] With the exception of a conclusory invocation of the Sixth Amendment at the trial level (J.A. at 8), respondent has not raised Sixth Amendment concerns to date and the Illinois courts ruled exclusively on his Fifth Amendment claim.

There is no evidence in the record that at the time respondent made statements to undercover agents implicating himself in the murder he had been formally charged with aggravated

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A.

Inmate Encounters With Persons They Do Not Know To Be Government Agents Do Not Carry Sufficient Potential For Coercion To Justify Application of *Miranda*'s Prophylactic Safeguards.

Prior to *Miranda*, the admissibility of a defendant's in-custody statements was judged solely by whether they were "voluntary" within the meaning of the Due Process Clause, which proscribed the use of statements obtained by unduly offensive methods or "under circumstances in

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battery, had previously requested counsel, or had previously invoked his right to silence. Even if these facts could be established, however, they could not support a Sixth Amendment claim because it is undisputed that respondent had not yet been formally or informally charged with murder. *See Maine v. Moulton*, 474 U.S. 159, 180, n. 16 (1985) (statements obtained in violation of Sixth Amendment right to counsel must be excluded only from trial of offense as to which the right has attached); *Moran v. Burbine*, 475 U.S. 412, 431 (1986) (same); *Kuhlmann v. Wilson*, 477 U.S. 436, 458, n. 21 (1986) (same). Nor could they affect petitioner's argument regarding the Fifth Amendment, which stresses the coercion-prevention measures outlined in *Miranda* to be wholly unnecessary during undercover encounters. *See Minnesota v. Murphy*, 465 U.S. 420, 424, n. 3 (1984) (request for lawyer irrelevant because suspect was not "in custody" and had no right to attorney's presence); *Rhode Island v. Innis*, 446 U.S. 291, 298, n. 2 (1980) (request for lawyer irrelevant because suspect was not "interrogated"); *Arizona v. Mauro*, 481 U.S. 520 (1987) (same). *Compare Arizona v. Roberson*, ___ U.S. ___, 108 S.Ct. 2093 (1988) (invocation of Fifth Amendment right to counsel by one in custody prohibits police from initiating "custodial interrogation" concerning even separate crimes).

which the suspect clearly had no opportunity to exercise 'a free and unconstrained will.'" *Oregon v. Elstad*, 470 U.S. 298, 304 (1985) (quoting *Haynes v. Washington*, 373 U.S. 503, 514 (1963)). In *Miranda*, this Court for the first time extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police. *New York v. Quarles*, 467 U.S. 649, 654 (1984). It reasoned that "[t]he potentiality for compulsion is forcefully apparent" in the interrogation environment, which is "created for no purpose other than to subjugate the individual to the will of his examiner" by isolating the suspect in an unfamiliar, police-dominated atmosphere and subjecting him to "menacing police interrogation procedures." *Miranda*, 384 U.S. at 457. This Court further determined that "[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.* at 467. *Miranda* therefore required that statements elicited during custodial interrogation be shown voluntary and be given "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

To effectuate this mandate, which provides "practical reinforcement" for the Fifth Amendment right, *Miranda* established specific protective guidelines impacting both the voluntary and knowing nature of a suspect's decision to speak. *Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974). Observing that an individual in custody may believe that interrogation will continue until a confession is obtained

or that silence in the face of accusation will bode ill for his trial, *Miranda* held that prior to questioning he must be clearly informed that he has a right to remain silent. *Miranda*, 384 U.S. at 468. Further, because "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators", the suspect must be clearly informed that even though indigent he has the right to consult with a lawyer before and during any questioning. *Id.* at 469-73. *Miranda* also dictates that once a suspect in custody indicates a desire to remain silent, interrogation must immediately cease, and once he requests counsel, further custodial interrogation cannot be initiated by authorities. *Arizona v. Roberson*, ___ U.S. ___, 108 S.Ct. 2093 (1988). Finally, *Miranda* requires that the subject be adequately informed of the consequences of foregoing the privilege against compulsory self-incrimination. *Miranda*, 384 U.S. at 469. *Miranda* thus sought to give the suspect "the power to exert some control over the course of the interrogation", *Burbine*, 475 U.S. at 426, control which would not likely be otherwise perceived because the common belief that in the face of official accusation one must speak to avoid continued harassment, or other harm at the hands of government, is reinforced by the suspect's isolation in an unfamiliar, police-dominated atmosphere from which he cannot physically escape. *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984).

The majority in *Miranda* did not quarrel with the prediction that its rules would markedly decrease the number of confessions available to law enforcement, *see Miranda*, 384 U.S. at 516-17 (Harlan, J., with whom Stewart, J., and White, J., join, dissenting), but struck a balance

in favor of the Fifth Amendment where "there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *Burbine*, 475 U.S. at 426. This balance, however, is a "subtle" one, for it must accommodate the undoubted need for police questioning in pursuit of "society's compelling interest in finding, convicting, and punishing those who violate the law." *Id.* Accordingly, though the Fifth Amendment has been explicitly extended to all official encounters, this Court has repeatedly admonished that *Miranda*'s "extraordinary safeguard 'does not apply outside the context of the inherently coercive interrogations for which it was designed.' " *Murphy*, 465 U.S. at 426, 430 (quoting *Roberts v. United States*, 445 U.S. 552, 560 (1980)). Rather, unless circumstances constitute "custodial interrogation" as contemplated by *Miranda*, a knowing waiver of the Fifth Amendment privilege is not required, *Garner v. United States*, 424 U.S. 648, 654, n.9 (1976), and the voluntary nature of statements remains properly judged by due process standards, *Elstad*, 470 U.S. at 307-08, which focus on governmental deprivation of the individual's "free choice to admit, to deny, or to refuse to answer." *Garner*, 424 U.S. at 657 (quoting *Lisemba v. California*, 314 U.S. 219, 241 (1947)). *See also Beckwith v. United States*, 425 U.S. 341, 348 (1976) (statements elicited during non-custodial interrogation rendered involuntary only where "the behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined") (quoting *Rogers v. Richmond*, 365 U.S. 534, 544 (1961)). *Cf. New York v. Quarles*, 467 U.S. 649, 655, n. 5 (1984) (though there

exists a public safety exception to *Miranda*, defendants may argue statements coerced "under traditional due process standards.")[3]

Miranda defines custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way." 384 U.S. at 444. This Court has since adopted or rejected the *Miranda* prophylaxis in a particular context by variously interpreting "custody" and "interrogation" in light of the reasonably foreseeable perceptions and reactions of the suspect. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 440, 442 (1984) (individual temporarily detained pursuant to ordinary traffic stop not "in custody" regardless of officer's unarticulated plan to effectuate formal arrest); *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980) (officers' conversation in presence of arrestee not "interrogation" where they should not have known it was reasonably likely to elicit

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[3] In *Colorado v. Connelly*, 479 U.S. 157, 170 (1986), this Court reiterated that "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion", and held that an express waiver of *Miranda* rights which is voluntary under the Due Process Clause will also be deemed voluntary for purposes of the Fifth Amendment. If governmental actions instill or intensify the perceived negative consequences of silence, or heighten the perceived positive consequences of speaking, they may operate to reduce the subject's perceived practical options to one of speaking. However, if the government merely militates against any perceived negative consequences of speaking, its behavior carries no coercive attributes because the option of silence remains unaffected. To constitute impermissible coercion, governmental conduct must amount to "overreaching". *Id.*

an incriminating response). However, consistent with its position that "[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated", *McCarty*, 468 U.S. at 437, this Court has recognized that *Miranda* was founded upon "the *interplay* of interrogation and custody", *Innis*, 446 U.S. at 299 (emphasis supplied), and that the ultimate question to be resolved is whether the scenario at issue "exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." *McCarty*, 468 U.S. at 437.

What, then, are the pressures impairing free choice which will likely come to bear on an inmate conversing with an undisclosed government agent? It is a given that the suspect is incarcerated and may thereby suffer heightened anxieties exacerbated by alienation from friends and family. *See Miller v. California*, 392 U.S. 616, 624 (1968) (per curiam) (Marshall, J., with Warren, C.J., Douglas and Brennann, J.J., dissenting from dismissal of certiorari) ("petitioner was in custody without bail, with a consequent lack of freedom to choose her companions"). However, as made clear in *Innis*, 446 U.S. at 300-01, and later in *Arizona v. Mauro*, 481 U.S. 520, 526 (1987), *Miranda* is not triggered solely by pressures "normally attendant to arrest and custody" even when coupled with immediate police presence of which the suspect is aware. It may also be presumed that undercover agents will initiate and actively participate in their encounter with the subject while harboring the hope that incriminating statements will be forthcoming. But again, *Miranda* is not triggered

solely by police-initiated questioning even when the officer's identity and purpose are known to the suspect and even where the officer has falsely exaggerated the evidence of guilt against him. *See Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam).[4] Finally, it is a given that the inmate is being "tricked" and that *Miranda* was critical of deceptive techniques employed by the police. *See Miranda*, 384 U.S. at 453-54. But the forms of trickery detailed there (staged lineups wherein the subject is falsely identified and official advice that silence will reflect guilt or place stress on family and finances) all tend to instill or reinforce in the suspect's mind the negative consequences of remaining silent. *See also Spano v. New York*, 360 U.S. 315 (1959); *Lynumn v. Illinois*, 372 U.S. 528 (1963). Some forms of trickery, on the other hand, will not carry coercive attributes even when accomplished in a jail or prison. *See, e.g., Procunier v. Atchley*, 400 U.S. 446, 454 (1971) ("The circumstances that the conversation was recorded without the respondent's knowledge did not tend to show either actual coercion or a potentially coercive setting."). *Cf. Kuhlmann v. Wilson*, 477 U.S. 436, 457-59 (1986) (surreptitious employment of cellmate as a "listening post" does not constitute "deliberate elicitation" for purposes of the Sixth Amendment).[5]

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[4] Recognition of the unique considerations arising in the investigation of prison crimes has deterred some courts from applying *Miranda* when, though an inmate is subjected to official questioning concerning such offenses, the interview itself does not restrict his freedom of movement. *See, e.g., United States v. Conley*, 779 F.2d 970 (4th Cir. 1985), *cert denied*, 479 U.S. 830 (1986).

[5] Lower courts have found that affirmative police deception will not necessarily invalidate a confession though it was

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Indeed, the deception inherent in undercover work actually serves to dispel the most significant source of potential coercion identified by *Miranda* – mutually reinforcing manifestations of police dominance. If a suspect is unaware that he is being confronted by a government agent, he will not be motivated to speak out of concern that the agent is part of a law enforcement system charged with unrelenting investigation from which "he cannot literally escape." *Murphy*, 465 U.S. at 433. Nor would he perceive a need to ingratiate himself with a law enforcement system which manages his physical environment, which "may ultimately cause the suspect to be charged with a crime", *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam), and which might seek to capitalize on his lack of cooperation to the suspect's detriment at trial. Further, other forms of pressure are less likely to occur because the suspect does not perceive an

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elicited in a context clearly requiring a knowing and intelligent waiver of rights under *Miranda*. *See, e.g., United States v. Velasquez*, 885 F.2d 1076 (3rd Cir. 1989). *See generally* W.E. Ringel, *Searches and Seizures Arrests and Confessions*, § 25.2(d) (2nd ed. 1986). The issue was left open in *Colorado v. Spring*, 479 U.S. 564 (1987), where this Court held that mere silence by law enforcement officials as to the subject matter of an interrogation does not constitute impermissible "trickery". *See also Moran v. Burbine*, 475 U.S. 412 (1986) (failure to inform suspect of attorney's efforts to reach him).

undercover agent to wield *any* power of the government[6] and because neither the agent nor identified police personnel will attempt to play upon hopes and fears in a manner which would risk disclosure of the agent's identity. Undercover investigations thus enhance the chances that statements will be the product either of pressure-free encounters or of " 'moral and psychological pressures to confess emanating from sources other than official coercion' " with which "the Fifth Amendment privilege is not concerned." *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)).

To be sure, it is possible to envision undercover scenarios which subsequent to arrest arguably " 'either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.' " *Id.* at 163 (quoting *Miller v. Fenton*, 474 U.S. 104, 109 (1985)). An agent posing as a defense attorney, for example, could rely on a suspect's need for legal advice in eliciting admissions. And an agent posing as a priest could exploit a particular suspect's need for religious absolution. But the legality of these and any other workable techniques will principally turn on the role being played by the agent rather than how that role is played, and they will

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[6] In *Mathis v. United States*, 391 U.S. 1 (1968), an IRS agent questioned an inmate as part of a routine tax investigation unrelated to the offense for which he was incarcerated. Over the dissent of three justices, this Court held *Miranda* warnings to be required. The government admittedly maintains extensive control over numerous and varied aspects of its citizens' lives independent of criminal law enforcement. Yet no motive directly associated with this power, including the conscience-ridden suspect's concern for the safety of children in *Innis*, could arise if a government agent's status is unknown to the suspect.

thus lend themselves to relatively clear-cut rules governing undercover work. More importantly, the mere risk of impermissible police activity should not automatically call into question the admissibility of statements which will generally be secured under conditions holding far less potential for coercion than the stationhouse questioning at issue in *Mathiason*, and far less potential for offending than the significant undercover police involvement in illicit drug manufacture sanctioned in *United States v. Russell*, 411 U.S. 423 (1973).[7]

The court below was simply wrong in its conclusion that by employing undercover agents against incarcerated suspects the government is doing indirectly what it cannot do directly under *Miranda*. *People v. Perkins*, 176 Ill. App. 3d 443, 449, 531 N.E.2d 141, 145 (5th Dist. 1988). What it cannot do directly is subject suspects to the inherently compelling pressures of custodial interrogation without adequate safeguards. Yet the very fact that government involvement is unknown to the suspect significantly mitigates potential pressures rendering application of *Miranda* unnecessary.

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[7] In *Russell*, this Court rejected not only a due process challenge but a non-constitutional entrapment defense, noting that there are circumstances when the use of deceit is the only practicable law enforcement technique available. 411 U.S. at 436. These circumstances will clearly arise in the context of crimes committed in a jail or prison, where potential witnesses may fear retaliation for communicating with authorities.

B.

Respondent's Conversation With Undercover Agents Did Not Constitute Custodial Interrogation As Contemplated By *Miranda*.

Even if the prophylactic safeguards of *Miranda* could be properly invoked to deny admission of some statements elicited by undercover agents, to apply *Miranda* on the undisputed facts here would farcically exploit this Court's well-intended goal of "preventing government officials from using the *coercive* nature of confinement to *extract* confessions that would not be given in an unrestrained environment." *Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987) (emphasis supplied).

Respondent was confined in a cellblock of the Montgomery County Jail containing approximately twelve open cells which led to a larger room with a table. Immediately upon being introduced to Agent Parisi by Charlton, respondent expressed his view that the jail was "rinky dink", showed Parisi a crowbar hidden in the bathroom which could be used in a jail break, declared that he could arrange to have someone smuggle in a gun, and suggested that the elderly jailor could easily be taken hostage. Respondent's confession to victim Stephenson's murder was given during an escape-planning session held by agreement with his perceived confederates in secrecy after other inmates were asleep. Further, Parisi's initial inquiry as to whether respondent had ever killed anyone carried no objective import other than its tangential relevance to the escape. And subsequent questions to which the suspect responded revealed no more than a professionally-based curiosity on the part of "killer" Parisi. Finally, there is no hint that respondent was unusually

susceptible to any form of persuasion other than appeals to his boredom, ill-conceived notions of self-accomplishment, or criminal nature.

Faced with the record here, respondent expressly declined to argue below that Parisi and Charlton subjected him to an "interrogation environment". Indeed, neither respondent nor the court below identified any *potentially* coercive attributes of the encounter other than the existence of police-initiated discussions with an incarcerated subject.[8] In truth, that respondent made incriminating statements reflects no more than a wholly unjustifiable "misplaced confidence" in whom he believed to be co-conspirators. *Hoffa v. United States*, 385 U.S. 293, 413 (1966). At the same time, there existed particular need for the investigative technique employed inasmuch as authorities had fruitlessly pursued an investigation into victim Stephenson's murder for 1½ years and, once learning from an inherently impeachable source that respondent may have been involved in the offense, law enforcement attempted an undercover street

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[8] The lower court, without elaboration, found that "the placement of Parisi in the cellblock with the defendant, and Parisi's inquiry whether the defendant had ever 'done someone' were words and actions reasonably likely to elicit an incriminating response from the defendant." *People v. Perkins*, 176 Ill. App. 3d 443, 447, 531 N.E.2d 141, 144 (5th Dist. 1988). If this is so, it is not because respondent could have felt any pressure to speak, but only because he had already gratuitously confessed to Charlton during their incarceration together at another facility.

investigation which became a jail investigation only because respondent had been incarcerated for another crime. The subtle balance struck by *Miranda* would be severely disrupted by its application to the facts presented here.

CONCLUSION

For the foregoing reasons, the People of the State Illinois respectfully request that the decision of the Appellate Court of Illinois, Fifth Judicial District, be reversed.

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QUESTION PRESENTED FOR REVIEW

Whether the factual determinations of the Circuit Court of St. Clair County, Illinois, and the Appellate Court of Illinois, Fifth Judicial District, that the respondent was subjected to custodial interrogation under *Miranda* by an undercover police officer while incarcerated in a county jail should be disturbed by This Court?

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUMMARY OF ARGUMENT

This case falls squarely within the express holding of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). This Court has consistently applied *Miranda* to cases that do fall within its express holding. The courts below found that Lloyd Perkins was (1) in custody, (2) questioned or interrogated, and (3) the interrogation was initiated by law enforcement agents. These are factual questions to be resolved by the lower courts in applying the well-settled principles of *Miranda*. That Lloyd Perkins was interrogated by an undercover agent not known by Lloyd Perkins to be a police officer does not take this case outside the confines of

the *Miranda* decision. The concerns that powered the *Miranda* decision are still present, and demonstrate that a valid waiver of the right against self-incrimination was not made by Lloyd Perkins. The custodial setting is inherently coercive, and that inherent coercion should have been dispelled by informing Lloyd Perkins of his right to remain silent and to have an attorney present during any interrogation, and allowing him to make the knowing choice of whether to exercise those rights. This Court should therefore affirm the judgments of the Circuit Court of St. Clair County, Illinois, and of the Appellate Court of Illinois, Fifth Judicial District.

ARGUMENT

THE WELL-SETTLED PRINCIPLES OF *MIRANDA* V. *ARIZONA* ARE APPLICABLE TO AGENTS OF THE STATE WHO ACT AS UNDERCOVER PLANTS AND CONDUCT SURREPTITIOUS INTERROGATIONS OF INCARCERATED DEFENDANTS IN THE POLICE-DOMINATED AND CONTROLLED ENVIRONMENT OF A JAIL.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Honorable Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from *custodial interrogation* of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444 (emphasis added). The procedural safeguards to which This Court referred are the now-familiar *Miranda* warnings, which must be given prior to any questioning by law enforcement agents, that the individual:

> has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for

> him prior to any questioning if he so desires . . . . But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Miranda, 384 U.S. at 479. In *Miranda* This Court determined that "concrete constitutional guidelines [under the fifth and fourteenth amendments of the Constitution of the United States] for law enforcement agencies and courts to follow" were necessary to ensure that there was a knowing, voluntary, and intelligent waiver of the defendant's rights under those amendments when a defendant was interrogated by law enforcement agents while in custody. *Miranda*, 384 U.S. at 442.

The State conceded in the courts below, and silently concedes in This Court, that Lloyd Perkins was not given *Miranda* warnings by Agent Parisi or Charlton. This concession is unremarkable, since both Parisi and Charlton testified at the hearing on the motion to suppress that *Miranda* warnings were not given to Lloyd Perkins. (J.A.55, 77) Consequently, the facts of this case come under the clear holding of *Miranda*, and demonstrate that Lloyd Perkins was subjected to "custodial interrogation".

This Court has on more than one occasion noted the desirability of the "bright line" rule of *Miranda*, and the need for certainty in the application of *Miranda* by all involved in the criminal justice system. *E.g.*, *Berkemer* v. *McCarty*, 468 U.S. 420, 432 (1984); *Fare* v. *Michael C.*, 442 U.S. 707, 718 (1979). *Cf. New York* v. *Quarles*, 467 U.S. 649, 658 (1984) (in recognizing the narrow "public safety exception" to the *Miranda* rule, the Court recognized that it lessened "the desirable clarity of that rule"). If other cases that come within *Miranda's* express holding

are exempted from the rule, this desirable feature would be lost, which can only bring confusion and uncertainty to the application of *Miranda*. Consequently, the State of Illinois' position is against the sound policy rationale of *Miranda's* "bright line" holding.

In *Miranda* This Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. Thus, the Circuit Court of St. Clair County and the Appellate Court of Illinois merely applied the facts of this case to the well-settled law of *Miranda*, and determined as a factual matter that the three elements of *Miranda*—(1) that Perkins was in custody, (2) that Perkins was questioned or interrogated, and (3) that this questioning was initiated by the police—were present in this case. Such factual findings of the circuit court are within its discretion to make and cannot be overturned by the reviewing court in Illinois unless manifestly erroneous. *People* v. *Conner*, 78 Ill. 2d 513, 401 N.E.2d 513 (1979). The Appellate Court's decision merely reflects that the circuit court's factual findings are not manifestly erroneous and, consequently, had to be affirmed as a matter of Illinois procedural law.

The following discussion of the *Miranda* factors demonstrates the correctness of the result reached below.

A. Lloyd Perkins Was In Custody For Purposes Of *Miranda* v. *Arizona*.

The State of Illinois admitted in the courts below that Lloyd Perkins was in custody under *Mathis* v. *United States*, 391 U.S. 1 (1968). *See also Beckwith* v. *United States*, 425 U.S. 341, 346 (1976); *Oregon* v. *Mathiason*, 429 U.S. 492, 494 (1977). Before This Court the State of

Illinois does not seriously contend that Lloyd Perkins was not in custody for purposes of *Miranda*. In *Mathis*, This Court held that a person who is in custody for an offense other than the one being investigated is still in custody for purposes of *Miranda*, and stated that nothing in *Miranda* warrants "a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody." *Mathis*, 391 U.S. at 4-5. Since Lloyd Perkins was incarcerated in the Montgomery County Jail at the time he was interrogated by Agent Parisi and Charlton, Perkins was quite obviously in custody. *See Holyfield* v. *State*, 101 Nev. 793, 711 P.2d 834, 837 (1985).

The Solicitor General's amicus brief attempts to deflect the obvious conclusion that Lloyd Perkins was in custody by asserting that "a prison inmate should be deemed to be in custody for purposes of *Miranda* only if he is subjected to more than the usual restraint on his liberty to depart." (Brief for the United States at 11) This contention can presumably be derived from the perception that the prison or jail has become the home of the prisoner and, therefore, a familiar place. That is not the case here, since Lloyd Perkins had been arrested only two days before, and was incarcerated in the Montgomery County Jail, not the Illinois Department of Corrections.

Further, whether the atmosphere is unfamiliar or familiar is simply irrelevant to the inquiry. One may be in the very familiar atmosphere of his home and still be in custody for purposes of *Miranda*. *Orozco* v. *Texas*, 394 U.S. 324 (1969). In *Orozco*, This Court rejected the argument "that since petitioner was interrogated on his own bed, in familiar surroundings, our *Miranda* holding should not apply." *Orozco*, 394 U.S. at 326.

The Solicitor General's argument could also be founded upon the premise that the prisoner's home is not an "interrogation environment". However, it is irrelevant whether there was an "interrogation environment". In *Oregon* v. *Mathiason*, 429 U.S. 492 (1977), This Court held that the defendant was not "in custody" for purposes of *Miranda* even though the defendant was being questioned by police officers at the police station. The Court held that the defendant was not "in custody" because he voluntarily came to the police station at the telephoned request of the police officer, was not under arrest, and was free to leave at any time. The Court noted that the question is whether the defendant was "in custody", not whether there was a "coercive environment." *Mathiason*, 429 U.S. at 495. *Mathiason* rejected the principal contention that the "interrogation environment" in which the questioning occurred required *Miranda* warnings.

Whether an individual is in custody is to be determined objectively, not by the subjective belief of the defendant. *Berkemer* v. *McCarty*, 468 U.S. 420, 442 (1984). Here Lloyd Perkins was incarcerated in the Montgomery County Jail. He consequently was in a custodial setting. *United States* v. *Henry*, 447 U.S. 264 (1980). This setting was dominated entirely by the police, and subject to all the coercive tactics inherent in such a setting. The setting was controlled to such an extent that the police could determine who would be Lloyd Perkins' constant companions while incarcerated. Since Lloyd Perkins had been arrested only two days before the interrogation occurred, the *Miranda* Court's concern that "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak" is present. *Miranda*, 384

U.S. at 461. Lloyd Perkins was isolated from the public, "cut off from the outside world", which was a great concern of the Court in *Miranda*, 384 U.S. at 445, 448, 455, and found to be absent from the routine traffic stop by the side of the road in *Berkemer* v. *McCarty*, 468 U.S. 420, 438 (1984), in which This Court found the defendant to be not in custody.

Consequently, Lloyd Perkins was "in custody" for purposes of *Miranda*.

B. Lloyd Perkins Was Subjected To Questioning For Purposes Of *Miranda* v. *Arizona*, Where The Questioning Was Initiated By Agent Parisi And Charlton.

Miranda requires that there be questioning or interrogation of the defendant. The Court's definition of "custodial interrogation" as "*questioning initiated* by law enforcement officers after a person has been taken into custody" makes that clear. *Miranda*, 384 U.S. at 444 (emphasis added). The Circuit Court of St. Clair County and the Appellate Court of Illinois found that questioning or interrogation by Parisi and Charlton did occur. (Appendix to Cert. Pet. at 11) (R.C69) *People* v. *Perkins*, 176 Ill. App. 3d 443, 531 N.E.2d 141, 144 (5th Dist. 1988). The State of Illinois also concedes that questioning of Lloyd Perkins took place. (Brief for Petitioner 5-9; Petition for Writ of Certiorari at 4) Parisi and Charlton were not just placed near Lloyd Perkins to hear whatever Perkins might say, or to have general conversations not related to the focus of the investigation; they were active agents in eliciting the information they desired. *Cf. Kuhlmann* v. *Wilson*, 477 U.S. 436, 459 (1986) (to demonstrate a sixth amendment violation the defendant must demonstrate that the informant in the jail "took some action, beyond merely listening"); *United States* v. *Henry*, 447 U.S. 264,

271 (1980) (defendant's sixth amendment right violated by the elicitation of incriminating statements that were the product of "conversation"). Parisi did not ask Lloyd Perkins an innocuous question and receive a totally unexpected response. Parisi and Charlton directly questioned Lloyd Perkins abut what they had been sent into the jail to learn. Parisi and Charlton initiated the discussion of the murder, and both prodded Lloyd Perkins for more details when he became silent.

In *Rhode Island* v. *Innis*, 446 U.S. 291, 300-01 (1980), This Court stated:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Under either phrasing of the test of "interrogation", Lloyd Perkins was interrogated for purposes of *Miranda*. The defendant was expressly questioned by Parisi and Charlton. The police acted with the sole purpose of obtaining an incriminating statement from Lloyd Perkins, of compelling him to make a statement when he otherwise would not do so freely and voluntarily. *Miranda*, 384 U.S. at 457, 464-65. Further, the questioning was initiated by the police by placing Parisi and Charlton into the cell with Lloyd Perkins, and Parisi and Charlton, not Perkins, initiated the questioning of Perkins. (J.A.59)

Consequently, the factual finding that Parisi and Charlton initiated the questioning and interrogated Lloyd Perkins is amply supported by the record.

C. Questioning Was Initiated By "Law Enforcement Officers" For Purposes Of *Miranda* v. *Arizona*.

Miranda mandates that before "law enforcement officers" may question someone in custody, he must be advised of his rights. The key ingredient is that the questioning is by "law enforcement officers" or other "agents of the State". It is obvious that statements made to a private citizen are admissible without *Miranda* warnings. *People* v. *Hawkins*, 53 Ill. 2d 181, 290 N.E.2d 231 (1972).

The circuit court found that Parisi and Charlton were "agents of the State" when they questioned Lloyd Perkins in the Montgomery County Jail. (Appendix to Cert. Pet. at 11) (R.C69) This factual finding is amply supported by the record. The State concedes this obvious factual conclusion in its brief, and notes that this is a case of "undercover agents". (Brief for Petitioner at 12)

John Parisi was a police officer, a special undercover narcotics agent working for the Metropolitan Enforcement Group of Southwestern Illinois. (J.A.16-17,22,40) While Charlton was not a police officer, nor apparently paid by the State, it is clear from the history of his association with the police and by his actions that he had become an agent of the State. *Mathis* v. *United States*, 391 U.S. 1 (1968); *Estelle* v. *Smith*, 451 U.S. 454 (1981); *Holyfield* v. *State*, 101 Nev. 793, 711 P.2d 834, 837 (1985). The only purpose that Charlton had in this undercover scam was to assist Parisi in interrogating Lloyd Perkins. Charlton was "functioning as an instrument of the police". *United States* v. *Brown*, 466 F.2d 493, 495 (10th Cir. 1972).

That Lloyd Perkins did not know he was speaking to agents of the State is not relevant, since the subjective state of mind of the defendant is not the relevant inquiry. The "bright line" rule of *Miranda* requires an objective determination of whether a state agent is involved. The defendant may believe that he is being interrogated by a state law enforcement officer, but if in fact he is not, *Miranda* warnings are not required to be given for any statement to be admissible. *See People* v. *Vlcek*, 114 Ill. App. 2d 74, 252 N.E.2d 377 (2d Dist. 1970). In *Holyfield*, the Nevada Supreme Court recognized the need for the objective determination of whether a state agent is involved, and rejected the State's contention "that *Miranda* applies only to those situations in which a figure of authority directly interrogates an accused." *Holyfield*, 711 P.2d at 837, 840.

Consequently, Charlton and Parisi were "law enforcement officers" under *Miranda*.

D. The Concerns That Powered The Decision In *Miranda* v. *Arizona* Are Present In This Case, And The Facts Of This Case Fall Within The Situations For Which *Miranda* v. *Arizona* Was Designed.

This Court in *Patterson* v. *Illinois*, 487 U.S. ____, 108 S.Ct. 2389, 101 L.Ed. 2d 261 (1988), recognized that *Miranda* is applicable to situations such as presented in this case. In *Patterson* This Court, by Chief Justice Rehnquist, stated that "a surreptitious conversation between an undercover police officer and an unindicted suspect would not give rise to any Miranda violation as long as the 'interrogation' was not in a custodial setting, see Miranda, 384 U.S. at 475". *Patterson*, 487 U.S. at ____, 101 L.Ed. 2d at 275 n.9.

This approach follows the well-settled law of *Miranda*. The focus is not upon the legal issue of whether *Miranda*

applies to undercover police agents in jails—*Miranda* does apply. As noted by the Court in *Miranda*, "[t]he fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated." *Miranda*, 384 U.S. at 478. Under this approach the focus is factual, whether there has been an "interrogation". This factual issue has been settled in this case by both the Circuit Court of St. Clair County and the Appellate Court of Illinois. Just as the Appellate Court of Illinois was bound by the circuit court's factual determinations, This Court also should defer to the factual findings of the lower courts. *North Carolina* v. *Butler*, 441 U.S. 369, 370-71 (1979).

The State of Illinois before This Court, as in the courts below, takes the position that *Miranda* is simply not applicable to this case. In its brief before This Court, the State of Illinois quotes the decision in *Colorado* v. *Connelly*, 479 U.S. 157, 170 (1986), that "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion". (Brief for Petitioner at 18) The State of Illinois continues with the argument that because Lloyd Perkins did not know that he was dealing with a governmental agent, there could not be any governmental coercion and, therefore, the fifth amendment's guarantee against self-incrimination is not applicable. The State of Illinois also quotes *Berkemer* v. *McCarty*, 468 U.S. 420, 437 (1984), "that [f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated". (Brief of Petitioner at 19) The State of Illinois then simply concludes that the concerns expressed in *Miranda* are not present in this case. Lloyd Perkins disagrees with these conclusions of

the State of Illinois, and asserts that the concerns that powered the decision in *Miranda* are present in this case.

In *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), This Court stated:

> Our opinion in Miranda make it clear that the prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice. See, ante, pp. 714-719. They are designed in part to assure that the person who responds to interrogation while in custody does so with intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it. In this respect the rulings secure scrupulous observance of the *traditional principle, often quoted but rarely heeded to the full degree, that "the law will not suffer a prisoner to be made the deluded instrument of his own conviction."* Thus while Escobedo and Miranda guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion.

Johnson, 384 U.S. at 729-30 (emphasis added), quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824). *See also Estelle* v. *Smith*, 451 U.S. 454, 462 (1981); *Culombe* v. *Connecticut*, 367 U.S. 568, 581 (1961). In this case, the lower courts refused to allow the prisoner Lloyd Perkins to be made the "deluded instrument of his own conviction". The courts below determined that Lloyd Perkins did not intelligently or understandingly relinquish his right against self-incrimination, or the consequences that flowed from that relinquishment, during the interrogation process. Lloyd Perkins' relinquishment of his right to remain silent was not the product of a free, voluntary, and deliberate choice, but was rather the product of police

deception and overreaching. *See Colorado* v. *Connelly*, 479 U.S. 157, 170 (1986).

The Court in *Miranda* was deeply concerned about several factors that make "custodial interrogation" inherently coercive; those factors are present in undercover custodial interrogations. The Court in *Miranda* was concerned that the waiver of the right to remain silent must be a free and rational choice (*Miranda*, 384 U.S. at 465), and must be made voluntarily, knowingly, and intelligently (*Miranda*, 384 U.S. at 465, 475, 478). In *Miranda* The Court was concerned that a valid waiver of the defendant's important constitutional rights could not be obtained if "the accused was threatened, *tricked, or cajoled* into a waiver". *Miranda*, 384 U.S. at 476 (emphasis added). That Lloyd Perkins was tricked into such a waiver is amply reflected by his assertion of his rights to remain silent and to counsel immediately after he was informed of his rights under *Miranda* when he was arrested on March 31, 1986, the day after he made the statement to Parisi and Charlton. (J.A.21,29,37,39) In this regard, the Appellate Court's statement that "[t]here is no authority in these circumstances for the police to do indirectly what they may not do directly" is quite appropriate. *People* v. *Perkins*, 176 Ill. App. 3d 443, 531 N.E.2d 141, 145 (5th Dist. 1988). (Appendix to Cert. Pet. at 8) *See also State* v. *Travis*, 360 A.2d 548, 551 (R.I. 1976). Although the State of Illinois believes this conclusion to be "simply wrong" (Brief for Petitioner at 23), this concern expressed by the Appellate Court and the Court in *Travis* is valid. Once interrogation by undercover agents is ripped from under the cover of *Miranda*, this technique will become the tool of choice by law enforcement to obtain evidence against an accused, even if he has invoked his right to remain silent in questioning by individuals known

by him to be police officers. This danger was obviously present in *Travis*, and was a prime consideration in that Court's decision.

The Court in *Miranda* further noted that the modern practice of custodial interrogation is "psychologically rather than physically oriented." *Miranda*, 384 U.S. at 448-49, 457. The danger to fifth amendment values of the various and numerous psychological ploys that can be used by undercover agents of the State in jails in order to trick a confession from a defendant is extremely great. A defendant in a county jail is in a "police-dominated atmosphere", and he has no real choice in his companions or with whom he associates. *Miranda*, 384 U.S. at 445. He is held virtually "incommunicado", deprived of "any outside support". *Miranda*, 384 U.S. at 445, 455. In this atmosphere he is subject to all the psychological ploys noted in *Miranda*, including kindness, emotional appeals, friendly-unfriendly appeals, excuses, as well as trickery and deception. *Miranda*, 384 U.S. at 450-55.

As noted by This Court in *United States* v. *Henry*, 447 U.S. 264, 274 (1980), "the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the *ploys* of undercover Government agents." (emphasis added) That an undercover agent "interrogates" a defendant in such an atmosphere is a violation of the right against self-incrimination, because the "adversary positions" are not "well-established" and the parties are not "'arm's-length' adversaries". *Henry*, 447 U.S. at 273. While the State of Illinois posits that the "deception inherent in undercover work actually serves to dispel the most significant source of potential coercion identified by *Miranda*" (Brief for Petitioner at 21), it cannot argue that other significant sources of potential

coercion do not remain. These sources of potential coercion are still "official coercion" in violation of *Miranda*.

The State of Illinois quotes This Court's decision in *Colorado* v. *Connelly*, 479 U.S. 157, 170 (1986), that "the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion'", *quoting Oregon* v. *Elstad*, 470 U.S. 298, 305 (1985). (Brief for Petitioner at 22) In *Connelly*, the defendant approached a police officer in public and confessed that he had committed a murder. Connelly was informed of his rights under *Miranda*, waived those rights, and made further statements. Later, it was determined that Connelly had confessed because "the voice of God" had told him to confess. This Court determined that "[t]he voluntariness of a waiver [of the fifth amendment] privilege has always depended on the absence of police overreaching". *Connelly*, 479 U.S. at 170. It was due to the lack of any action by the State in bringing about Connelly's mental state that led This Court to conclude that Connelly's waiver of his fifth amendment privilege was valid. However, state action and official coercion are present in this case. State action occurred by the police placing the undercover agent in the cell with Lloyd Perkins to interrogate Perkins. Moreover, it is on the objective view of the undercover agent as an agent of the State, not the "deluded belief" of the defendant, that the courts must focus.

The State of Illinois would also want This Court to believe that *United States* v. *Henry*, 447 U.S. 264 (1980) and *Hoffa* v. *United States*, 385 U.S. 293 (1966), have settled the question of whether *Miranda* is applicable to the situation of an undercover agent questioning an inmate in a jail. (Brief for Petitioner at 12) However, *Hoffa* merely stated the obvious conclusion that *Miranda* was

not applicable because Hoffa was not in custody at the time the informant was engaged in discussions with Hoffa. This Court in *Henry* understood this important distinction when it stated, "[i]t is quite a different matter when the Government uses undercover agents to obtain incriminating statements from persons *not in custody* but suspected of criminal activity prior to the time charges are filed." *Henry*, 447 U.S. at 272 (emphasis added). The quotation used by the State of Illinois in its brief must be understood in that context. The Court in *Henry* did not understand *Hoffa* to stand for the proposition that undercover agents are never required to give *Miranda* warnings before a "custodial interrogation".

Consequently, This Court should affirm the judgments of the Circuit Court of St. Clair County and the Appellate Court of Illinois, Fifth Judicial District, because those courts merely applied the settled law of *Miranda* to the particular facts of this case. If This Court concludes that the lower courts erroneously applied *Miranda* and reverses the judgment of the Appellate Court, This Court should remand the cause to the Appellate Court for further proceedings to determine whether the Constitution of the State of Illinois has been violated. The Circuit Court of St. Clair County based its judgment upon "not only the Federal Constitution, but the Constitution of the State of Illinois". (R.C83) While the Appellate Court did not rely on the Illinois Constitution in reaching its decision, it should be allowed to determine whether the judgment of the circuit court can be upheld on that basis.

CONCLUSION

Because the courts below properly applied *Miranda* to this case, the respondent, Lloyd Perkins, respectfully request that the judgments of the Circuit Court of St. Clair County and of the Appellate Court of Illinois, Fifth Judicial District, be affirmed. If This Court reverses the Appellate Court, This Court should remand the cause to the Appellate Court of Illinois to determine whether the judgment of the circuit court must be affirmed under the Constitution of the State of Illinois.

Respectfully submitted,

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No. 88-1972

Supreme Court, U.S.
FILED
JAN 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

LLOYD PERKINS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, Fifth Judicial District

REPLY BRIEF FOR PETITIONER

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No. 88-1972

In The

Supreme Court of the United States

October Term, 1989

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

LLOYD PERKINS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, Fifth Judicial District

REPLY BRIEF FOR PETITIONER

Both respondent and amici American Civil Liberties Union (ACLU) fundamentally misperceive petitioner's position to be that an exception to *Miranda v. Arizona*, 384 U.S. 436 (1966), should be carved out for undercover activities. (Resp. Br. at 4) (ACLU Br. at 6, 14-16) It is accurate to characterize the holding of *New York v. Quarles*, 467 U.S. 649 (1984), as creating a public safety exception to *Miranda* because there warnings were found not to be required despite the existence of those inherently compelling circumstances contemplated by *Miranda*. However, the undercover scenario does not present those

circumstances and *Miranda's* specific concerns are not triggered in the first instance. Petitioner does not ask this Court to create an exception to *Miranda*, but only to ensure that its "extraordinary safeguard 'does not apply outside the context of the inherently coercive interrogations for which it was designed.' " *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984) (quoting *Roberts v. United States*, 445 U.S. 552, 560 (1980)).

The misperception of respondent and the ACLU arises from their talismanic invocation of "custody" and "interrogation" definitions independently derived from Fifth Amendment precedent of this Court in which undercover questioning was not involved and it was unnecessary to analyze in depth the interplay of both factors as they relate to potential coercion. (Resp. Br. at 5, 8) (ACLU Br. at 7, 8)[1] In *Mathis v. United States*, 391 U.S. 1 (1968), there was no question that the inmate had been formally interrogated by one whom he knew to wield governmental power, and the only issue was whether that authority must precisely reflect the same governmental power resulting in and controlling the inmate's confinement. Similarly, in *Rhode Island v. Innis*, 446 U.S. 291 (1980), there was no question of the suspect's awareness that he was in the immediate custody of the same officers

[1] Contrary to respondent's assertion (Resp. Br. at 4, 5), petitioner has conceded custody only in the factual sense that respondent was incarcerated in an institution at the time he confessed. Despite respondent's suggestion (Resp. Br. at 4, 9), whether he was subjected to "custodial interrogation" for purposes of *Miranda* on the undisputed facts here is clearly a legal question. *See Arizona v. Mauro*, 481 U.S. 520, n. 6 (1987).

who affirmatively subjected him to "subtle compulsion", and the only issue was whether authorities should have known incriminating statements to be the likely result of their actions.[2]

Nor can respondent (Resp. Br. at 7, 8, 18) and the ACLU (ACLU Br. at 8, 17) properly rely on this Court's Sixth Amendment "deliberate elicitation" cases inasmuch as the policies underlying that amendment are distinct from those underlying the Fifth.[3] The Sixth Amendment was designed to ensure that an accused receives necessary "aid in coping with legal problems or assistance in meeting his adversary." *United States v. Ash*, 413 U.S. 300, 313 (1973). The need for professional aid after indictment is not triggered by perceived pressures to speak alone, but even more forcefully by the uncounseled suspect's *failure* to perceive those circumstances rendering a decision to speak unwise. *See United States v. Henry*, 447 U.S. 264, 273 (1980). Thus, the Sixth Amendment imposes on the government an "affirmative obligation not to act in a

[2] Respondent additionally cites *Orozco v. Texas*, 394 U.S. 324 (1969), and *Oregon v. Mathiason*, 429 U.S. 492 (1977), for the proposition that neither familiarity with surroundings nor the existence of an "interrogation environment" is relevant to the inquiry of whether one is in custody. (Resp. Br. at 5, 6) However, *Orozco* merely holds that custodial interrogation can occur even in the suspect's home when he is under the immediate restraint of known police officers. And *Mathiason*, far from finding a coercive environment to be irrelevant, held that *Miranda* is not triggered by such an environment *alone*.

[3] In *United States v. Surridge*, 687 F.2d 250, 253 (8th Cir.), *cert. denied*, 459 U.S. 1044 (1982), cited by the ACLU, the court merely assumed arguendo that the Sixth Amendment deliberate elicitation test applies in the Fifth Amendment context.

manner that circumvents the protections accorded the accused by invoking this right," *Maine v. Moulton*, 474 U.S. 159, 176 (1985), and deliberate elicitation by craft is not consistent with this duty though the circumstances are devoid of compelling influences.

The Fifth Amendment, on the other hand, does not create a right not to confess except knowingly and with the tactical assistance of counsel; "there is only a right not to be *compelled* to confess." Kamisar, *Brewers v. Williams, Massiah* and *Miranda:* What Is "Interrogation"? When Does It Matter?, 67 Geo. L. J. 1, 48 (1978). So too the purpose of *Miranda's* prophylactic safeguards is not to discourage volunteered statements, but to "prevent[] government officials from using the *coercive* nature of confinement to *extract* confessions that would not be given in an unrestrained environment." *Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987) (emphasis supplied). Therefore, while the intent of authorities is relevant in analyzing the forseeability of their actions to ensure requisite governmental involvement, *Innis*, 446 U.S. at 301, n. 7, the critical focus of the Fifth Amendment inquiry must be on the perceptions of the suspect, *id.* at 301-02, which may pressure him to speak. *Berkemer v. McCarty*, 468 U.S. 420, 438 (1984). And while elicitation perceived as official may give rise to a prophylactic presumption of compulsion, it does not follow that elicitation alone requires the same result even when accompanied by incarceration. Instructive on the point is *Henry*, which unlike *Mathis* and *Innis* specifically contemplated an undercover jailhouse scenario:

> It is undisputed that Henry was unaware of Nichols' role as a Government informant. The government argues that this Court should apply a less rigorous standard under the Sixth Amendment where the accused is prompted by an undisclosed undercover informant than where the accused is speaking in the hearing of persons he knows to be Government officers. That line of argument, however, seeks to infuse Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel.

447 U.S. at 272-73. The Fifth and Sixth Amendment distinction can hardly be characterized as "bizarre" (ACLU Br. at 9), particularly where it has been repeatedly emphasized by this Court. (*See* Pet. Br. at 12-13)[4]

The principal argument of respondent and the ACLU is founded on the proposition that *Miranda* requires an inmate's decision to speak to be the product of a "rational" choice (Resp. Br. at 13) and forbids "government efforts to capitalize on the ignorance of suspects and to keep them uninformed of the consequences of incriminating statements." (ACLU Br. at 11) Respondent points out various "psychological ploys" detailed in *Miranda* (Resp. Br. at 18), and the ACLU asserts that, "[l]ike the police

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[4] By proferring independent Argument C, the ACLU appears to suggest that whether the Fifth Amendment permits an undercover cellmate to act as a mere "listening post" is an open question, though *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), held the practice permissible under the Sixth. Because "the Sixth Amendment's protection of the attorney-client relationship . . . extends beyond *Miranda's* protection of the Fifth Amendment right to counsel," *Patterson v. Illinois*, 487 U.S. ___, 108 S.Ct. 2389, 2397, n. 9 (1988), it is clear conduct not amounting to Sixth Amendment deliberate elicitation will not suffice to trigger *Miranda*.

practice of deliberately giving false legal advice condemned in *Miranda*, undercover interrogation lulls the suspect into a false sense of security about the legal consequences of a conversation for the sole purpose of obtaining incriminating statements." (ACLU Br. at 12) However, as noted in petitioner's opening brief at 20, the ploys hypothesized in *Miranda* such as conveying false legal advice tend to instill or reinforce the negative consequences of remaining silent by their substance, professional source, and most importantly by the suspect's common belief that the same authorities seeking a response maintain significant control over his immediate future. In contrast, merely "lulling" the suspect into a false sense of security does not affirmatively encourage him to speak and cannot be deemed coercive in any sense of the word. Quite simply, the suspect is not " '*made* the deluded instrument of his own conviction.' . . . by the simple, cruel expedient of *forcing* [evidence] from his own lips." *Culombe v. Connecticut*, 367 U.S. 568, 581-82 (1961) (quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824)) (emphasis supplied).

Perhaps more understandable is the complaint that undercover questioning of an incarcerated suspect is unfair because authorities have a unique opportunity to exploit his vulnerability by controlling those with whom he comes in contact.[5] Yet even in the Sixth Amendment

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[5] In support of its assertion that "a growing number of state courts" have recognized the inherent unfairness of undercover jailhouse investigations, however, the ACLU cites only one case decided in the last decade. (ACLU Br. at 14, n. 8) It

(Continued on following page)

context *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), held it permissible to deliberately cell the suspect with an unknown government agent acting as a "listening post". It is difficult to see how, in light of Fifth Amendment concerns, the added circumstance of uncoercive questioning suddenly renders the conduct unduly unfair. Subtle questioning, of course, might make it more likely that incriminating statements will be forthcoming. However, from a comparative standpoint the authorized use of an informant in a case like *Hoffa v. United States*, 385 U.S. 293 (1966), is more likely to deceive a suspect than the use of an informant in confinement. "[A] jail shares none of the attributes of privacy of a home, an automobile, an office or a hotel room" because "official surveillance has traditionally been the order of the day." *Lanza v. New York*, 370 U.S. 139, 143 (1962); *Hudson v. Palmer*, 468 U.S. 517, 527 (1984). Prisoners are also savvy enough to realize that fellow inmates are willing to trade the police information incriminating their cellmates in return for favorable treatment for themselves.

(Continued from previous page)

should also be noted that in *Tarnef v. State*, 512 P.2d 923 (Alaska 1973), the suspect knew the "undercover" investigator to be aligned with authorities to the extent that he believed the agent's failure to administer *Miranda* warnings would render the statements inadmissible at a trial. Similarly, in *Commonwealth v. Hamilton*, 285 A.2d 172 (Pa. 1971), statements were made while the suspect was in the immediate custody and presence of known officers. Finally, the relevant observation in *Commonwealth v. Mahnke*, 335 N.E.2d 660 (Mass. 1975), arose in *dicta*.

As noted in petitioner's opening brief at 21-22, coercive undercover behavior will not be the norm.[6] The ACLU specifically points out that a case may arise wherein confessions result from physical intimidation (ACLU Br. at 14, n. 8, 15) First, techniques encouraging confessions to be given directly to known authorities cannot truly be characterized as undercover and therefore are not contemplated by petitioner's argument. Second, only under unique circumstances could agents effectively engender pressure perceived to be extra-legal because the suspect could legitimately respond by immediately seeking aid from known authorities. *Cf. McCarty*, 468 U.S. at 438 (1984) (where potential antagonist is known police officer, significant that routine traffic stop occurs in view of passersby who reduce opportunity for and fear of abuse). Third, the risk that prisoners will *falsely* confess to crimes to impress their cellmates (ACLU Br. at 15-16) is even more insubstantial because it is assumed that "persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." Notes of Advisory Committtee on Proposed Federal Rules of Evidence, 28 U.S.C. p. 733 (comment to Fed. R. Evid. 804(b)(3) on statements against interest). "Indeed, within weeks after our decision in *Miranda*, we declined to apply that decision retroactively to state prisoners on federal habeas, noting that the *Miranda* rule was

[6] Contrary to respondent's suggestion (Resp. Br. at 11), nowhere has petitioner intimated that governmental coercion could not *conceivably* arise in undercover investigations.

unrelated to the truth seeking function of the criminal trial, and that its application on federal habeas 'would require the retrial or release of numerous prisoners found guilty by trustworthy evidence.' " *Duckworth v. Eagan*, 492 U.S. ___, 109 S.Ct. 2875, 2883 (1989) (O'Connor, J., concurring) (quoting *Johnson v. New Jersey*, 384 U.S. 719, 731 (1966)).[7]

As did the court even in *State v. Atkins*, 446 P.2d 660 (Or. 1968) (en banc) (ACLU Br. at 14, n. 8), the propriety of potentially coercive undercover tactics can be litigated pursuant to traditional concepts of voluntariness. Respondent and the ACLU argue that to follow this approach would undermine the certainty of *Miranda*'s prophylactic rule and require broadened inquiry into the reliability of particular statements. (Resp. Br. at 3) (ACLU Br. at 15) It is true that if *Miranda* is held inapplicable to jailhouse questioning, just as it has been held inapplicable to pre-*Miranda* custodial interrogations and governmental conduct not constituting "custodial interrogation", case-by-case determinations of coercion and reliability will be necessary for purposes of assessing Fifth Amendment and Due Process claims. But this is the inevitable consequence of ensuring that law enforcement is not deprived of legitimate and effective techniques which pose no substantial risk of jeopardizing constitutional rights.

[7] The ACLU also erroneously assumes that prosecutors will increasingly utilize prisoner confessions as "the sole evidence in criminal trials." (ACLU Br. at 16) In the majority of jurisdictions, including Illinois, a defendant cannot be convicted on the basis of his uncorroborated confession alone. *See Smith v. United States*, 348 U.S. 147 (1954); *People v. Hubbard*, 38 Ill.2d 104, 230 N.E.2d 220 (1967).

Finally, the ACLU's attempt to unmask actual coercive influences in the present case is not well-conceived. It is simply ludicrous to suggest that the escape-planning ruse employed here "almost required" that respondent confess to the murder of Richard Stephenson. (ACLU Br. at 16-17) First, even respondent appears to agree that statements concerning an on-going criminal conspiracy are not protected by *Miranda*. (Resp. Br. in Op. to Pet. for Cert. at 6) Second, because Agent Parisi himself was posing as a professional killer, nothing in the nature of the ruse could be said to have pressured respondent into admitting a past violent act, much less into a lengthy, detailed murder confession. An inquiry as to whether respondent had killed anyone, unaccompanied by any intimation that negative consequences would follow absent an admission, can hardly be termed "police action at its most aggressive." (ACLU Br. at 17)

Agent Parisi did not use a custodial setting to extract respondent's confession, since he did not even subtly invoke the legal authority of his badge or the extralegal authority of his nightstick to elicit statements. What Agent Parisi did was to lull respondent into confessing by taking advantage of respondent's misplaced trust in one whom he believed to be a co-conspirator. But that is deception, not coercion. As this Court recognized in *Hoffa*, because the two are different in fact, no alchemy can treat them as the same in law.

CONCLUSION

For the foregoing reasons, and those set forth in their opening brief, the People of the State of Illinois respectfully request that the decision of the Appellate Court of Illinois, Fifth Judicial District, be reversed.

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Supreme Court, U.S.
FILED
NOV 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1972

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF ILLINOIS, PETITIONER

v.

LLOYD PERKINS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an undercover law enforcement officer must give *Miranda* warnings to an incarcerated suspect before asking him questions that may elicit an incriminating response.

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STATE OF ILLINOIS, PETITIONER

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ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether law enforcement authorities may use undercover officers to question the uncharged suspect of a crime while he is incarcerated in a jail or prison. The United States has an interest in the Court's resolution of that question for several reasons. The federal government operates numerous jail and prison facilities for persons who have been arrested for or convicted of a crime. The Court's decision in this case will therefore affect the ability of the federal government to use this law enforcement tool. The federal government also prosecutes cases referred from state or local authorities. The Court's decision will affect the federal govern-

ment's ability to prosecute such cases in which state undercover agents have obtained admissions from incarcerated suspects. Finally, the federal government has an interest in the Court's interpretation of the scope of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), an issue that is raised by this case.

STATEMENT

1. On November 8, 1984, Richard Stephenson was shot and killed in Fairview Heights, a suburb of East St. Louis, Illinois. No one was arrested for the homicide, and as of early 1986 the crime remained unsolved. In March of that year, Donald Charlton told police officers that he had information concerning a homicide in the East St. Louis area that had occurred about two years earlier. Charlton, an inmate at the Graham Correctional Facility in Hillsboro, Illinois, was serving a six-year prison sentence for burglary. He told police that he had met respondent when they were imprisoned together at the Graham facility, and that respondent had said he had murdered someone in East St. Louis. Although Charlton did not know the victim's name, the facts Charlton related closely coincided with the facts known to the officers about the murder of Richard Stephenson. The police concluded that only the perpetrator would know the facts of the murder in the detail that Charlton related. Pet App. 2a; Tr. 3-6, 26, 57-60, 72; 4/11/86 Tr. 2-3.[1]

Following up on Charlton's leads, the officers learned that respondent had recently been released from custody. The officers then decided to use Charl-

[1] "Tr." refers to the transcript of the February 18, 1987, suppression hearing. The hearing on April 11, 1986, was a preliminary hearing.

ton as an informant to elicit information from respondent. The officers obtained a court order releasing Charlton from the Graham facility on March 28, and they arranged to have Charlton wear a body recording device when he met with respondent. During the next three days, Charlton made several efforts to contract respondent but was unable to reach him. Tr. 7-8, 19, 21-22, 26-28, 61-62.

On March 30, 1986, the officers learned that respondent was being held in the Montgomery County, Illinois, jail pending trial for an unrelated charge of aggravated battery. The officers decided that it would be impractical to use an eavesdropping device in respondent's cell or a body recording device on an undercover officer. The officers decided, however, to place an undercover agent posing as an escaped convict with respondent in the jail cellblock to seek to learn whether respondent had committed the Stephenson murder. Pet. App. 2a; Tr. 8-10, 28-30.

The following day, John Parisi, the officer who was to serve as the undercover agent in the jail, met with Charlton at the Fairview Heights police station. Parisi and Charlton were instructed to engage respondent in conversation and to report anything that he said about the Stephenson murder. Their cover story would be that after escaping from a Cook County, Illinois, work release program, Parisi and Charlton made their way to Montgmery County in order to join respondent so that all three could leave for California, but that they were arrested in the course of a burglary. That evening, Parisi, who was using the alias "Vito Bianco," and Charlton were processed into the jail and dressed in jail clothes. They were then placed in the cellblock, which consisted of 12 separate cells that opened into a large

room. Pet. App. 2a-3a; Tr. 10-13, 16-18, 35-40, 54-55, 63-65.

After entering the cellblock, Charlton spoke with respondent briefly and introduced him to Parisi. Parisi told respondent that he "wasn't going to do any more time," Tr. 41, and he suggested that all three should escape from the jail. Respondent replied that the Montgomery County jail was "a rinky-dink jail" and that they could "break out." *Ibid.* He also said that he could arrange to have someone smuggle in a gun, and the three of them decided to kill anyone who tried to interfere with their escape. Respondent then showed Agent Parisi a hidden, makeshift crowbar that respondent said could be used during their escape to take the jail guard hostage. The three decided to meet later that evening after the other inmates went to sleep. Pet. App. 2a; Tr. 40-43, 65-67.

Agent Parisi, Charlton, and respondent met at midnight in respondent's cell. Respondent said that his girlfriend could smuggle an automatic pistol into the jail on visiting day, April 1. Tr. 43-45. Charlton said, "'Hey, I'm not a murderer, I'm a burglar. That's your guys' profession.'" Tr. 44; see Tr. 67. After telling Charlton that he would be responsible for any murder that occurred, Parisi asked respondent, "Have you ever done anybody[?]" Tr. 44. Respondent said he had, and then recounted in detail the events of the Stephenson murder for approximately 35 minutes. Tr. 45-49.[2] Afterward, Parisi

[2] Respondent said that he was paid $5,000 for the "job" by a man who wanted Stephenson maimed because Stephenson owed the man money for narcotics and was having an affair with the man's wife. Respondent explained that he had "cased" Stephenson's house for about a week before the murder. On the day of the murder, respondent approached Stephenson's house at 8:30 p.m. wearing a trench coat to conceal a sawed-off .12 gauge shotgun. Stephenson met respondent at the door to his home, and he asked respondent to step into the garage. As the garage door opened, respondent asked the victim if his name was "Steve," and he then shot Stephenson in the right leg. Respondent was about to shoot Stephenson again, but he decided not to do so because he heard several dogs barking in the garage. The shotgun blast severed Stephenson's femoral artery, and he bled to death in 30 seconds. Respondent then ran back to the car and drove away with his two confederates. Tr. 45-49, 68-70; 4/11/86 Tr. 5.

and respondent engaged in the "usual jailhouse talk" while watching television for 15-20 minutes. Respondent then went to sleep on the floor outside his cell. Parisi and Charlton did not again speak to respondent. Tr. 50, 70-71. Parisi did not give respondent *Miranda* warnings before speaking with him. Pet. App. 3a-4a.

On April 1, respondent was arrested and charged with the Stephenson murder. Respondent was given *Miranda* warnings, and he asked for a lawyer. Pet. App. 3a; Tr. 14-16, 22-24, 32-33, 52, 56, 71.

2. Before trial, respondent moved to suppress the statements made to Agent Parisi in the Montgomery County jail. Following an evidentiary hearing, the trial court granted the motion to suppress. The court ruled that Parisi and Charlton were "agents of the State and had conducted questioning of the defendant concerning the alleged offense while he was in custody and without advising him of his rights" as required by *Miranda*. Pet. App. 11a.

3. On the State's appeal, the Appellate Court of Illinois, Fifth Judicial District, affirmed. Pet. App. 1a-9a. Relying on *Mathis v. United States*, 391 U.S. 1 (1968), the court held that respondent was "in custody" for purposes of *Miranda* since he was incarcerated at the time he was questioned, even

though he was not being held on the Stephenson murder charge. Pet. App. 5a. According to the court, "*Miranda* applies even when the purpose of the custody is unrelated to the purpose of the interrogation, as in the instant case." *Ibid.* Moreover, the court ruled that Agent Parisi's questioning of respondent amounted to an "interrogation" as this Court used the term in *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). Pet. App. 5a-6a. The Illinois court explained that "the placement of Parisi in the cellblock with [respondent], and Parisi's inquiry whether [respondent] had ever 'done someone[,]' were words and actions reasonably likely to elicit an incriminating response from [respondent]." *Id.* at 6a.

The court rejected the State's argument that *Miranda* applies "only in those situations where a figure of authority directly interrogates the accused" and, accordingly, does not apply to questioning by an undercover police officer. Pet. App. 8a-9a. "There is no authority in these circumstances," the court stated, "for the police to do indirectly what they may not do directly." *Id.* at 8a. Underlying *Miranda*, the court wrote, "is the conviction that a warning before questioning is essential in overcoming the pressures of interrogation and in aiding the truth-finding function." *Ibid.* Allowing the use of an undercover officer to elicit an incriminating statement from a person in custody would encourage law enforcement personnel to use "surrepitious tactics" to "subvert" a suspect's Fifth Amendment privilege against compulsory self-incrimination, and "would render [respondent's] fifth-amendment privilege wholly meaningless." *Id.* at 8a-9a.

The Illinois Supreme Court denied the State leave to appeal. Pet. App. 10a.

SUMMARY OF ARGUMENT

1. This Court's decision in *Mathis* v. *United States*, *supra*, does not require the extraordinary procedure that all incarcerated suspects receive *Miranda* warnings before speaking with an undercover officer. *Mathis* did not involve the use of an undercover officer to talk with a suspect in jail; inasmuch as the latter practice does not raise the same concerns that underlay the Court's decision in *Miranda*, the rules adopted in that case should not apply in this quite different setting.

The concept of "custodial interrogation" within the meaning of *Miranda* is limited to settings in which police questioning creates the type of coercion that can overcome a suspect's will to remain silent. A prison inmate is not subject to the kinds of coercion associated with "custodial interrogation" any time he is questioned by officials, simply because he is not free to leave the prison: it follows, *a fortiori*, that a prison inmate is not subjected to "custodial interrogation" when he is questioned by an undercover agent. An undercover agent's conversation with a suspect in jail will not be seen by the suspect as coercive or threatening, since the suspect will believe that he is speaking to a fellow inmate. Deception to elicit information voluntarily provided is simply not coercion. Accordingly, the use of an undercover agent to speak to a suspect in jail does not trigger the procedures required in *Miranda* for circumstances constituting "custodial interrogation."

2. When it employs an undercover agent rather than a readily identifiable police officer to speak with an incarcerated suspect, the government is not doing indirectly what *Miranda* forbids it from doing directly. The purpose of the procedures adopted in *Miranda* was to prevent law enforcement officers from using a coercive setting to extract from a suspect a confession that he would not have given in an unrestrained environment. But an undercover agent does not coerce a suspect into confessing; the officer lulls a suspect into confessing by taking advantage of the suspect's misplaced trust in a fellow prisoner. This Court held in *Hoffa* v. *United States*, 385 U.S. 293 (1966), that the use of an informant to obtain incriminating statements from a suspect is not a form of coercion; a decade later the Court held in *Oregon* v. *Mathiason*, 429 U.S. 492 (1977), that police deception does not itself render a setting coercive under *Miranda*. The use of undercover officers has long been accepted as a legitimate investigative technique, and it is often the only means of identifying a guilty party. The rule adopted by the Illinois court in this case effectively prevents the police from using that practice if a suspect is incarcerated. Such a rule would impose a costly burden on law enforcement without measurably adding to the protection of a suspect's legitimate Fifth Amendment interests.

ARGUMENT

AN UNDERCOVER POLICE OFFICER NEED NOT ADMINISTER *MIRANDA* WARNINGS BEFORE ELICITING INCRIMINATING STATEMENTS FROM AN INCARCERATED SUSPECT

A. There Is No Per Se Requirement To Administer *Miranda* Warnings Before Questioning An Incarcerated Inmate

The Self-Incrimination Clause of the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." As the text of the Clause indicates, "a necessary element of compulsory self-incrimination is some kind of compulsion." *Hoffa* v. *United States*, 385 U.S. 293, 304 (1966). Accord *United States* v. *Washington*, 431 U.S. 181, 187 (1977) ("Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions."). Furthermore, the Clause is not self-executing; a person against whom official compulsion is directed must invoke the privilege in a timely manner or forfeit its benefits, despite the fact that the requested disclosure will prove incriminating. *Minnesota* v. *Murphy*, 465 U.S. 420, 427-428 (1984) (collecting cases).

Miranda created a limited exception to that rule for the unique environment of police custodial interrogation. In that context, the Court excused a person's failure to invoke the privilege because the Court believed that official interrogation of a suspect in a police-dominated, custodial environment invariably generates "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise

do so freely." 384 U.S. at 467. To dissipate that compulsion, *Miranda* regulated the conduct of police custodial interrogation by devising prophylactic safeguards that are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974).

Miranda involved custodial police questioning of individuals suspected of criminal activity who were not otherwise confined. A prison inmate who is questioned without the imposition of any additional restraints on his liberty is not in the same position for purposes of *Miranda* as a suspect who was previously at liberty and is taken into custody for the purpose of questioning. The courts of appeals have recognized that "[a] rational inmate will always accurately perceive that his ultimate freedom of movement is absolutely restrained and that he is never at liberty to leave an interview conducted by prison or other government officials." *United States* v. *Conley*, 779 F.2d 970, 973 (4th Cir. 1985), cert. denied, 479 U.S. 830 (1986). Thus, to apply the traditional standard for determining whether an interviewee is in custody for purposes of *Miranda* "would be tantamount to a *per se* finding of 'custody' " for prison inmates. *Ibid.*; see also *Cervantes* v. *Walker*, 589 F.2d 424, 427-428 (9th Cir. 1978) (application of the traditional "free to leave" standard would "lead to the conclusion that all prison questioning is custodial because a reasonable prisoner would always believe he could not leave the prison freely," thus leading to "the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart").

A prison inmate, of course, cannot leave his surroundings and therefore is literally "in custody" at all times. But the restraints on an inmate's liberty that are a constant feature of prison life become familiar to the inmate and are therefore unlikely to have the coercive effect that *Miranda* warnings are designed to dispel. The inherently coercive effects that *Miranda* found to be associated with custodial interrogation arise in the prison context only if an inmate's liberty is further limited, for purposes of the interrogation, in a manner different from what the inmate experiences as the standard condition of day-to-day prison life. As the Ninth Circuit has observed, "[i]n the prison situation, [the concept of restricting the suspect's freedom] necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement. * * * [W]e look to some act which places further limitations on the prisoner." *Cervantes* v. *Walker*, 589 F.2d at 428; accord *United States* v. *Cooper*, 800 F.2d 412, 414-415 (4th Cir. 1986); *United States* v. *Conley*, 779 F.2d at 972-974; *United States* v. *Scalf*, 725 F.2d 1272, 1275-1276 (10th Cir. 1984); *United States* v. *Hayes*, 646 F. Supp. 146, 149-151 (N.D. Ind. 1986). For these reasons, a prison inmate should be deemed to be in custody for purposes of *Miranda* only if he is subjected to more than the usual restraint on his liberty to depart. *Cervantes* v. *Walker*, 589 F.2d at 428.[3]

[3] Aside from the effect that a per se rule requiring *Miranda* warnings would have on cases like this one, that rule would disrupt the ability of prison administrators to conduct informal questioning of an inmate about, for example, a prison disturbance. Yet, *Miranda* said that it was "not intended to hamper the traditional function of police officers in investi-

We do not believe that a contrary result is required by this Court's decision in *Mathis* v. *United States*, 391 U.S. 1 (1986). In *Mathis*, an inmate incarcerated in a state prison was interviewed by an agent of the Internal Revenue Service about possible federal income tax violations. The agent did not administer *Miranda* warnings before initiating the questioning. This Court reversed the inmate's subsequent conviction for filing false tax returns on the ground that incriminating statements made in the course of the interview should not have been admitted at trial. The Court rejected the government's argument that *Miranda* is applicable "only to questioning [of] one who is 'in custody' in connection with the very case under investigation." 391 U.S. at 4-5.

To be sure, the Court's brief opinion in *Mathis* can be read as establishing a per se rule that an inmate who is subject to questioning is automatically "in custody" and is therefore entitled to *Miranda* warnings merely by virtue of his status as a prisoner. We believe, however, that *Mathis* is better understood as simply rejecting the government's competing per se rule that *Miranda* should not be applicable to an inmate who is in custody in connection with a case other than the one under investigation. Several courts of appeals have interpreted *Mathis* in that fashion. See *United States* v. *Willoughby*, 860 F.2d 15, 23 (2d

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gating crime" and that "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by [the Court's] holding." 384 U.S. at 477. To define all questioning in the prison setting as "custodial interrogation" for purposes of *Miranda* would deprive law enforcement officers and prison administrators of their ability to conduct such informal questioning free of the constraints of *Miranda* procedures.

Cir. 1988) ("the mere fact of imprisonment does not mean that all of a prisoner's conversations are official interrogations that must be preceded by *Miranda* warnings"), cert. denied, 109 S. Ct. 846 (1989); *Leviston* v. *Black*, 843 F.2d 302, 304 (8th Cir.) ("incarceration does not *ipso facto* render an interrogation custodial"), cert. denied, 109 S. Ct. 168 (1988); *United States* v. *Conley*, 779 F.2d at 972; *Cervantes* v. *Walker*, 589 F.2d at 427.[4] Under that interpretation, a prisoner is not put in a better position than an ordinary citizen by being entitled to *Miranda* warnings prior to questioning of any sort, regardless of the setting. On the other hand, the prisoner is not put in a worse position than unincarcerated persons, since he is entitled to *Miranda* warnings if the normal cir-

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[4] Most state courts that have addressed the issue have reached the same conclusion. See *State* v. *Fulminante*, 778 P.2d 602, 607 (Ariz. 1989); *People* v. *Williams*, 44 Cal. 3d 1127, 1141-1142, 751 P.2d 901, 910-911, 245 Cal. Rptr. 635, 644-645, cert. denied, 109 S. Ct. 514 (1988); *People* v. *Aalbu*, 696 P.2d 796 (Colo. 1985); *Boutwell* v. *State*, 256 Ga. 63, 344 S.E.2d 222 (1986); *State* v. *McDonald*, 387 So. 2d 1116, 1120 (La.), cert. denied, 449 U.S. 957 (1980); *Hamilton* v. *State*, 62 Md. App. 603, 609-617, 490 A.2d 763, 766-770, cert. denied, 303 Md. 682, 496 A.2d 682 (1985); *People* v. *Smith*, 117 Misc. 2d 737, 739-740, 459 N.Y.S.2d 528, 532 (Sup. Ct. 1983); *Ohio* v. *Swinney*, No. 87 CA 41 (1989 WESTLAW 86260) (Ohio App. July 15, 1989); *Blain* v. *Commonwealth*, 7 Va. App. 10, 13-15, 371 S.E.2d 838, 840-841 (1988). Contra *State* v. *Perkins*, 753 S.W.2d 567, 570-573 (Mo. Ct. App. 1988); *State* v. *Fuller*, 204 Neb. 196, 281 N.W.2d 749 (1979); *Holyfield* v. *State*, 101 Nev. 793, 801-802, 711 P.2d 834, 839-841 (1985); *Commonwealth* v. *Chacko*, 500 Pa. 571, 577-578, 459 A.2d 311, 314-315 (1983); *State* v. *Travis*, 116 R.I. 678, 681-683, 360 A.2d 548, 550-551 (1976); *State* v. *LaRue*, 19 Wash. App. 841, 845-846, 578 P.2d 66, 69 (1978).

cumstances of his confinement are changed for purposes of the interview in question.[5]

B. *Miranda* Does Not Restrict An Undercover Agent's Activities

Even if *Mathis* is interpreted to require that formal questioning in the prison setting always be preceded by *Miranda* warnings, that principle should not be extended to communications between suspects and undercover agents. Conversations between a suspect and an undercover agent bear no resemblance to the kind of custodial interrogation that gave rise to the Court's *Miranda* decision, and the principles of *Miranda* therefore cannot sensibly be applied in that setting.

A meeting between an undercover agent and a prisoner bears none of the hallmarks of the coercive environment with which the Court in *Miranda* was concerned. In this case, for example, respondent would not have assumed that "Vito Bianco" had any

[5] Formal investigative questioning of an inmate typically results in a change in the normal circumstances of the inmate's confinement that may justify a finding that the inmate was in custody for *Miranda* purposes. That was the case in *Mathis*, and it was also the case in several of the court of appeals cases that have held *Miranda* applicable to interrogation of a prison inmate. See *Battie* v. *Estelle*, 655 F.2d 692, 699 (5th Cir. 1981) (defendant awaiting trial in county jail was entitled to *Miranda* warnings when he was examined by a court-appointed psychologist); *Palmigiano* v. *Baxter*, 510 F.2d 534, 536-537 (1st Cir. 1974), rev'd on other grounds, 425 U.S. 308 (1976) (*Miranda* warnings required when incarcerated suspect was interviewed in connection with prison disciplinary proceeding); see also *Estelle* v. *Smith*, 451 U.S. 454, 466-469 (1981) (warnings must precede court-ordered psychiatric examination of prisoner).

legal authority to interrogate him or that he had any legal responsibility to answer, that their conversations would continue until he confessed to murdering Stephenson, or that his insistence on remaining silent might lead to physical abuse. To the contrary, respondent was free to ignore Agent Parisi when they were introduced, to skip their midnight meeting, or to leave it at any time.

Respondent may have believed that it was necessary to recount the details of the Stephenson murder in order to impress "Vito Bianco," and respondent probably felt secure that doing so was harmless, because he and "Vito Bianco," in Charlton's words, were members of the same "profession." Tr. 44. But respondent certainly did not incriminate himself because of any fear that "Vito Bianco" would see to his imprisonment or would impose some form of extra-legal punishment if he remained silent. That fact is crucial because it was the psychological technique of subtly instilling that fear in a suspect in custody that *Miranda* sought to counteract through the requirement of warnings. *Miranda* was not even remotely concerned with rescuing a suspect from foolhardy bravado.

That the practice of using an undercover agent is designed to elicit a confession from a suspect provides no ground for objection. *Miranda* did not forbid the government from obtaining a confession to prove a defendant's guilt. In fact, *Miranda* emphasized that "[c]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence." 384 U.S. at 478. In subsequent decisions, the Court has also refused to treat as a form of "custodial interrogation" law enforcement practices that did not offend the concerns under-

lying *Miranda*, even though in each case the officers either believed or knew that the suspect might incriminate himself. See, *e.g.*, *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *California* v. *Beheler*, 463 U.S. 1121 (1983); *Minnesota* v. *Murphy*, *supra*; *Arizona* v. *Mauro*, 481 U.S. 520 (1987). The practice here cannot be treated as the equivalent of a classic stationhouse interrogation simply because both share the same goal or have similar prospects of success. It can be deemed custodial interrogation under *Miranda* only if it creates the same coercive environment that *Miranda* described.

Only a readily identifiable law enforcement officer can instill such fear in a suspect. As Professor Kamisar has written, a police officer's actions " 'take on color from [his] uniform, badge, gun and demeanor.' " Kamisar, Brewer *v.* Williams, Massiah, *and* Miranda: *What Is "Interrogation"? When Does It Matter?*, 67 Geo. L.J. 1, 67 (1978). The threatening nature of the setting is important, because the question whether a suspect has been subjected to a custodial interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980).[6] Thus, if an officer "carries neither badge nor gun and wears not 'police blue,' but the same prison gray" as the suspect, Kamisar, 67 Geo. L.J. at 67, "the interplay of interrogation and custody," *Innis*, 446 U.S. at 299, that troubled the Court in *Miranda* is not present, because "the suspect thinks

[6] See also *Berkemer* v. *McCarty*, 468 U.S. 420, 442 (1984) ("A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.")

he is dealing only with someone 'in the same boat,' as well as the same cell." Kamisar, 67 Geo. L.J. at 67. As the Third Circuit has explained:

> [I]t is inconceivable that the defendant could have experienced the coercion-born type of fear and intimidation set forth in *Miranda*, because when he volunteered this incriminatory statement, he thought that he was conversing with a fellow partner in crime, not a policeman. The predicate of *Miranda* is the inherently coercive nature of police interrogation of a person in custody; it cannot have application to a situation where one, not under stress of interrogation, simply volunteers a statement which perchance turns out to be inculpatory.

United States v. *Fioravanti*, 412 F.2d 407, 413-414, cert. denied, 396 U.S. 837 (1969) (footnote omitted). See also *United States* v. *Willoughby*, 860 F.2d at 23-24.[7]

[7] As Professor Kamisar has noted, 67 Geo. L.J. at 65 (footnotes omitted):

> When a suspect is arrested and brought downtown for police questioning, at least in the case of a major felony, he will often be in "a crisis-laden situation. The stakes for him are high—often his freedom for a few or many years—and his prospects hinge on decisions that must be quickly made: to cooperate and hope for leniency, to try and talk his way out, to stand adamantly on his rights." But why, when he thinks he is merely conversing with a fellow prisoner, when he has no notion that he is confronting the police, would a suspect worry about "how much leniency cooperation may earn, how likely fast talk is to succeed, and how much a steadfast refusal to talk may contribute to a decision by the police, prosecutor or judge to 'throw the book' at him"?
>
> One can deliberately elicit incriminating statements from a person without having him realize it—that is

It is wrong to contend that *Miranda* warnings are necessary to create a "level playing field" because a suspect in jail is especially vulnerable due to his confinement and therefore may unwisely utter incriminating statements to other inmates who turn out to be informants.[8] Although confinement generates anxiety, *Innis* recognized that the anxiety caused by incarceration does not require the suppression of a suspect's unwarned statements. 446 U.S. at 300; see Kamisar, 67 Geo. L.J. at 61-62. It is also irrelevant that an inmate mistakenly believes that his cellmate is a fellow prisoner. "This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." *Oregon* v. *Elstad*, 470 U.S. 298, 316 (1985). See also *Beheler*, 463 U.S. at 1125-1126 n.3. The police do not violate *Miranda* by listening to a suspect who voluntarily but unwittingly incriminates himself by admitting conduct that he does not know to be criminal. So, too, the police do not violate *Miranda* by listening to a suspect who voluntarily but unwit-

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what happened in *Massiah*. But how can one envelop someone in a "police-dominated atmosphere" without having him realize it? How can one produce an "interrogation environment" well-calculated to "subjugate the individual to the will of his examiner" when the individual is not even aware that he is in the presence of "his examiner"? That is why, I submit, whatever may lurk in the heart or mind of the fellow prisoner (or apparent friend or colleague), if it is not "custodial police interrogation" *in the eye of the beholder*, then it is not such interrogation within the meaning of *Miranda*.

[8] See Dix, *Undercover Investigations and Police Rulemaking*, 53 Tex. L. Rev. 203, 230 (1975); White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581, 604-605 (1979).

tingly incriminates himself by confessing facts about a known crime to an unknown police officer. Neither case has the element of coercion that prompted the Court in *Miranda* to scrutinize the process of in-custody interrogation.

In this case, the state appellate court was highly critical of Agent Parisi's use of a ruse to hoodwink respondent into believing that the agent was a fellow "ex-con" seeking to escape from jail. That court believed that permitting law enforcement officers to act in that manner would improperly allow "the police to do indirectly what they may not do directly," to "subvert" *Miranda*, and to render "wholly meaningless" a suspect's Fifth Amendment privilege. Pet. App. 8a-9a. A few other courts have endorsed that view as well.[9] That view, however, fundamentally misconceives the concerns informing *Miranda*.

In the undercover setting, the officer is not "using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Mauro*, 481 U.S. at 530. Rather, the officer is taking advantage of the suspect's misplaced trust in a fellow prisoner. But there is nothing improper about requiring a suspect to bear the risk of disloyalty. It is well settled that a person can be made to bear the risk that his acquaintances will reveal his statements to a larger audience. "The risk inheres in all communications which are not in the

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[9] See *United States* v. *Brown*, 466 F.2d 493 (10th Cir. 1972); *State* v. *Perkins*, 753 S.W.2d at 570-571; *State* v. *McMullan*, 713 S.W.2d 881 (Mo. Ct. App. 1986); *Holyfield* v. *State*, 101 Nev. at 801-804, 711 P.2d at 839-841; *State* v. *Travis*, 116 R.I. at 681-683, 360 A.2d at 550-551. Contra *United States* v. *Willoughby*, 860 F.2d at 23-24; *Hamilton* v. *State*, 62 Md. App. at 611-616, 490 A.2d at 767-770. Cf. *United States* v. *Fioravanti*, 412 F.2d at 413-414.

sight of the law privileged," *Lopez* v. *United States*, 373 U.S. 427, 450 (1963) (Brennan, J., dissenting), and communications made during the course of a conspiracy to break out of "a rinky-dink jail" and assault a prison guard in the process do not fit into that category.

Nothing in *Miranda* put an end to that police practice, even for a suspect in custody. "The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." *Colorado* v. *Connelly*, 479 U.S. 157, 170 (1986). This Court's decision in *Hoffa* v. *United States*, 385 U.S. 293 (1966), proves that the use of undercover agents does not amount to coercion. While Hoffa was on trial, he frequently met with a labor official named Edward Partin who was under indictment and who, unbeknownst to Hoffa, was cooperating with federal law enforcement authorities. During their conversations, Hoffa revealed his attempts to bribe members of the jury, and Partin recounted those statements at Hoffa's subsequent trial on jury tampering charges. 385 U.S. at 294-299. This Court rejected Hoffa's contention that admission of Partin's testimony violated the Fifth Amendment, holding that "no claim has been or could be made that [Hoffa's] incriminating statements were the product of any sort of coercion, legal or factual." *Id.* at 304. The Court also found that Hoffa's conversations with Partin were "wholly voluntary," even though Partin had duped Hoffa into believing that he was a sympathetic colleague. *Ibid.* See also *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969) (rejecting the claim that the confession of a defendant in custody was involuntary on the ground that he was falsely told that his co-defendant had turned state's evidence); *Procunier* v. *Atchley*, 400 U.S. 446, 453-454 (1971) (the use of an informant to obtain

a statement from a suspect in prison does not render his statement involuntary); *Flittie* v. *Solem*, 775 F.2d 933, 944-945 (8th Cir. 1985) (en banc), cert. denied, 475 U.S. 1025 (1986) (same).

This case is identical to *Hoffa* in that respect. Neither Agent Parisi nor Charlton intimidated or threatened respondent in any manner. Respondent voluntarily—and without hesitation—described how he had murdered Stephenson. The only difference between this case and *Hoffa* is that respondent was incarcerated when he spoke to Agent Parisi. But while that fact bears on the question whether Agent Parisi used the coercive nature of respondent's confinement to extract a confession that he would not have made outside of jail, see *Mauro*, 481 U.S. at 530, it is entirely immaterial to the question whether the use of an undercover agent to talk to a suspect renders any ensuing confession involuntary.

Hoffa stands for the proposition that the use of deception to elicit a confession from a suspect does not violate the Self-Incrimination Clause. That decision is also a complete answer to concerns voiced by the Illinois appellate court that the policies underlying *Miranda* forbid the police from surreptitiously obtaining incriminating statements from a suspect.

Although *Miranda* was not applicable to Hoffa's case, the Court's subsequent decision in *Oregon* v. *Mathiason*, *supra*, demonstrates that *Miranda* does not require a different result. *Mathiason* rejected the claim that an officer's act of falsely telling a suspect that the suspect's fingerprints had been found at the scene of a crime rendered the interview custodial in nature. "Whatever relevance this fact may have to other issues in the case," the Court held, "it has nothing to do with whether [Mathiason] was in custody for purposes of the *Miranda* rule." 429 U.S. at 495-496.

Respondent also can draw no support from the Court's Sixth Amendment decisions in *Massiah* v. *United States*, 377 U.S. 201 (1964), *United States* v. *Henry*, 447 U.S. 264 (1980), and *Maine* v. *Moulton*, 474 U.S. 159 (1985). Those cases held that the government may not use an undercover agent to elicit incriminating statements from a suspect once he is charged with a crime. After the initiation of formal charges, the Sixth Amendment ensures that the accused may rely on counsel as a medium between him and the State, and thus imposes on the government the "affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right." *Moulton*, 474 U.S. at 176. The Court's decision in *Miranda*, by contrast, did not impose any such obligation on the police, since it did not forbid the police from attempting to obtain a suspect's confession. *Miranda* only limits an officer's opportunity to use a coercive setting to "extract" a confession from a suspect. *Mauro*, 481 U.S. at 530. Because that does not occur in cases like this one, the *Miranda* rules are inapplicable; those rules do not apply "outside the context of the inherently coercive custodial interrogations for which [they were] designed." *Roberts* v. *United States*, 445 U.S. 552, 560 (1980). See also *Murphy*, 465 U.S. at 430; *Mathiason*, 429 U.S. at 495; *Beckwith* v. *United States*, 425 U.S. 341 (1976).

The rule adopted by the Illinois appellate court would not, of course, mean that undercover officers would give suspects *Miranda* warnings before engaging them in conversation; no officer could possibly do so while maintaining his cover. Rather, the unavoidable consequence of that rule would be that law enforcement authorities would have to either release a suspect and then hope to find him (or impose 24-hour

surveillance on him) before pursuing their investigation, or abandon the use of undercover agents to engage incarcerated suspects in conversation.[10] The first approach poses the risk that the suspect will flee or commit additional crimes while at large. The second approach needlessly hampers effective law enforcement without protecting any legitimate constitutional interest.

Undercover investigations are often vitally important in obtaining proof of a suspect's guilt. Accordingly, this Court has repeatedly upheld the use of undercover operations and the deceit that necessarily accompanies that practice.[11] In some cases, such as

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[10] That may not be all that the Illinois appellate court sought to prohibit. It criticized not only "[Agent] Parisi's inquiry whether [respondent] had ever 'done someone,'" but also "the placement of [Agent] Parisi in the cellblock with [respondent]," Pet. App. 6a. That court may have intended to suggest that the latter technique *alone* constitutes a custodial interrogation under *Miranda*. If so, that suggestion is clearly in error under *Rhode Island* v. *Innis*, *supra*, because placing Agent Parisi in respondent's cellblock was no more a custodial interrogation than was placing Innis in the police squad car. Cf. *Kuhlmann* v. *Wilson*, 477 U.S. 436, 458-459 (1986) (holding that the use of a jailhouse informant to listen to, but not question, the defendant does not violate the Sixth Amendment; "the defendant must demonstrate that the police and their informant took some action, beyond mere listening, that was designed deliberately to elicit incriminating remarks").

[11] See, *e.g.*, *Grimm* v. *United States*, 156 U.S. 604, 610-611 (1895); *Price* v. *United States*, 165 U.S. 311, 315 (1897); *Casey* v. *United States*, 276 U.S. 413, 418-420 (1928); *Lopez* v. *United States*, *supra*; *Lewis* v. *United States*, 385 U.S. 206 (1966); *Hoffa* v. *United States*, *supra*; *United States* v. *White*, 401 U.S. 745 (1971); *United States* v. *Russell*, 411 U.S. 423 (1973); *Hampton* v. *United States*, 425 U.S. 484 (1976).

this one, the use of an undercover agent is likely to be the only way for the authorities to identify and prosecute the responsible party. The costs imposed on law enforcement by the Illinois court's rule are therefore quite high; yet, the rule's benefits to Fifth Amendment values are virtually nil. Although the Court in *Miranda* believed that the inherently coercive setting created by a classic police custodial interrogation justified the regulation of that particular police investigative practice, the use of an undercover agent simply does not raise the same self-incrimination concerns.

CONCLUSION

The judgment of the Appellate Court of Illinois, Fifth Judicial District, should be reversed.

Respectfully submitted.

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NOVEMBER 1989

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 262203 596

MOTION FILED
NOV 15 1989

No. 88-1972

In The
Supreme Court of the United States
October Term, 1989

STATE OF ILLINOIS,
Petitioner,

--against--

LLOYD PERKINS,
Respondent.

ON WRIT OF CERTIORARI
TO THE ILLINOIS APPELLATE COURT,
FIFTH DISTRICT

MOTION TO FILE BRIEF AND BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., THE NATIONAL SHERIFFS' ASSOCIATION, AND THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, IN SUPPORT OF THE PETITIONER.

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No. 88-1972

In The
Supreme Court of the United States
October Term, 1989

STATE OF ILLINOIS,
Petitioner,
--against--

LLOYD PERKINS,
Respondent.

ON WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIFTH DISTRICT

MOTION TO FILE BRIEF AND BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., THE NATIONAL SHERIFFS' ASSOCIATION, AND THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, IN SUPPORT OF THE PETITIONER.

Come now Americans for Effective Law Enforcement, Inc., et al., and move this Court for leave to file the attached brief as *amici curiae,* and declare as follows:

1. *Identity and Interest of Amici Curiae.* The *amici curiae* are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty times in the Supreme Court of the United States, and over thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding

purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

The Illinois Association of Chiefs of Police (ILLACP), represents law enforcement executives and administrators in the State of Illinois. It actively engages in training programs and publications for Illinois law enforcement officers, as well as *amicus curiae* advocacy in cases critical to law enforcement interests in the State.

2. *Desirability of an Amici Curiae Brief. Amici* are professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of conducting interrogations of suspects within the bounds of the law, and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors -- including active law enforcement administrators and counsel -- we possess direct knowledge of the impact of

the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, IACP, NDAA, NSA, and ILLACP are state and national associations, and their perspective is broad. This brief concentrates on policy issues, including the values served by the adoption of reasonable rules for guiding police conduct in the law of interrogation. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* has reviewed the facts of this case and has conferred at length with counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Petitioner has been received and filed with the clerk of this Court. This Motion is necessary because the Respondent has not as of the time of printing of the Brief granted consent to *amici* in writing. Should it be received thereafter, it will be filed by counsel with the clerk of this Court with a request that this motion be withdrawn and the brief be deemed filed with the consent of all parties.

For these reasons, the *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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INTEREST OF AMICI

See Section on Identity and Interest of *Amici Curiae, supra.*

STATEMENT

A prison inmate, serving a six year term for burglary, revealed to the police that he had information regarding a homicide. His stated motivation was his feeling that "people should not kill people." The facts he revealed coincided closely with the case facts already known to the police, so his information was considered reliable.

The named individual, subsequently the Respondent in the instant case (hereinafter referred to as defendant), was located in a county jail. An undercover police officer and the informant were placed in a cell block with him. The informant introduced the officer as a fellow escapee from a correctional institution. They also posed as being under arrest for burglary. Soon all three were conversing as to how to escape from their present confinement, but they postponed discussion of the details until the other inmates had gone to sleep. At that meeting the officer/prisoner asked the defendant whether he had ever "done someone," whereupon the defendant related in detail the murder he had committed. The next

morning the defendant was taken to court and charged with the crime.

Obviously, no warnings had been given to the defendant prior to his incriminating statements. As a consequence, the trial court granted a suppression motion, on the ground that the informant and the police officer/prisoner were agents of the state and that fact, plus the custodial situation, required the issuance of the warnings prescribed in *Miranda v. Arizona,* 384 U.S. 436 (1966).

The trial court's suppression order was sustained on appeal. *People v. Perkins,* 176 Ill. App. 3d 443, 531 N.E.2d 141, 126 Ill. Dec. 8 (5th Dist. 1988).

ARGUMENT

DEFENDANT WAS NOT SUBJECTED TO CUSTODIAL INTERROGATION FOR PURPOSES OF *MIRANDA v. ARIZONA* WHEN AN UNDERCOVER AGENT, POSING AS AN ARRESTEE, ASKED HIM WHETHER HE HAD EVER "DONE SOMEONE" [KILLED SOMEONE] WHILE DEFENDANT WAS BEING HELD ON AN UNRELATED CHARGE; FAILURE OF THE AGENT TO WARN DEFENDANT OF HIS RIGHTS UNDER *MIRANDA* DOES NOT REQUIRE SUPPRESSION OF DEFENDANT'S STATEMENTS.

I.

No better analysis and presentation of the core issue in the present case can be offered than that which appears in a 1978 law review article by Professor Yale Kamisar of the University of Michigan Law School. It carries the title "Brewer v. Williams, Massiah, and Miranda: What Is Interrogation and When Does it

Matter?," and was published in the Georgetown Law Journal (Vol. 67, No. 1, 1-101). Following are its relevant portions as they appear in the text, at pages 63-64, but with omission of the footnotes:

> ...It is the impact on the suspect's mind of the *interplay* between police interrogation and police custody--each condition *reinforcing* the pressures and anxieties produced by the other--that, as the *Miranda* Court correctly discerned, makes "custodial police interrogation" so devastating. It is the suspect's realization that the *same persons* who have cut him off from the outside world, and have him in their power and control, want him to confess, and are determined to get him to do so, that makes the "interrogation" more menacing than it would be without the custody and the "custody" more intimidating than it would be without the interrogation.
>
> It is this *combination* of "custody" and "interrogation" that creates--and, in the absence of "adequate protective devices," enables the police to exploit--an "*interrogation* environment" designed to "subjugate the individual to the will of his examiner." It is this *combination*--more awesome, because of the interplay, than the mere sum of the "custody" and "interrogation" components--that produces the "interrogation atmosphere," "*interrogation* ... in a *police dominated* atmosphere" that "carries its own badge of intimidation," that "exacts a heavy toll in individual liberty and trades on the weakness of individuals," and that is so "at odds" with the privilege against compelled self-incrimination.
>
> In the "jail plant" or other "undercover"

situations, however, there is no *integration* of "custody" and "interrogation," no *interplay* between the two, at least none where it counts--in the suspect's mind. So far as the suspect is aware, he is not "surrounded by antagonistic forces"; "[t]he presence of an attorney, and the warnings delivered to the individual" are not needed to "enable [him] under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process." He simply is not in the "compelling circumstances" that require *Miranda* warnings to be given; he is not being subjected to the "interrogation process."

So far as the suspect is aware, his fellow prisoner neither controls his fate nor has a professional interest in his case. So far as the suspect is aware, his fellow prisoner does not care whether he confesses, and thus has little cause to become abusive by trying to "bully" him if he does not. Moreover, even if the fellow prisoner did care, and cared a great deal, there is no reason to think that he possesses the power over the suspect or the necessary skills and training to press demands and to weary the suspect with contradictions of his assertions until the case "is brought to a definite conclusion."

A fellow prisoner may, of course, communicate his determination to get answers to his questions by wielding a knife or clenching his fist, but that is a different case. There is nothing *inherently* compelling about talking with, or being talked to by, a prisoner in the same or an adjoining cell. For the suspect thinks he is dealing with *an equal,* not with his captors.

Amici fully concur with the statements of Professor Kamisar, who, as the Court may well know, has been a staunch supporter of the mandate of *Miranda v. Arizona.* That fact warrants attention when consideration is given to his views as expressed in the foregoing quotations from his article.

II

The fact that the informant was accompanied by an undercover officer does not in any way diminish the applicability of Professor Kamisar's analysis to the present case. Moreover, he specifically states elsewhere in his article, at page 65, that "whatever may lurk in the heart or mind of the fellow prisoner (or apparent friend or colleague), if it is not 'custodial police interrogation' in the *eye of the beholder,* then it is not such interrogation within the meaning of *Miranda.*"

III

The use of informants in the police function is an absolute necessity. Many serious crimes would remain unsolved but for informant involvement. Then, too, we should not treat lightly the admonition of the informant in this case that "people should not kill people." To sustain the Illinois Appellate Court's ruling would offer no encouragement to the application of that principle.

Amici urge this Court to reverse the decision of the lower court. In doing so there will be a correction of the misunderstanding of *Miranda* not only by the Illinois court but also by the courts of Nevada, Nebraska, and Rhode Island, whose decisions were cited and discussed in the opinion of the court below.

CONCLUSION

Once again evidence has been presented of the adverse impact of *Miranda v. Arizona* on trial courts and many appellate courts which should be spared the diversion of their primary responsibility of making reasonably possible the conviction of the guilty and affording adequate protection to the *innocent.* Overzealousness in implementing the prophylactic rules of *Miranda,* as in the present case, should be discouraged by this Court. Beyond that, we respectfully suggest that there be an elimination of the confusion and needless expenditure of trial and appellate court time and effort by overruling *Miranda,* either in this case or in some other one at the earliest opportunity. For a survey and discussion in support of that suggestion, see Inbau and Manak, "Miranda v. Arizona--Is It Worth the Cost?," 24 Cal. West. L. Rev. 185-200 (1988).

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Supreme Court, U.S.
FILED
NOV 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 88-1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

LLOYD PERKINS,
Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois For The Fifth Judicial District

BRIEF FOR *AMICI CURIAE* THE LINCOLN LEGAL FOUNDATION; LIVINGSTON COUNTY, ILLINOIS; THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION; THE ILLINOIS SHERIFFS ASSOCIATION; AND THE ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS

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November 16, 1989.

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BRIEF FOR *AMICI CURIAE* THE LINCOLN LEGAL FOUNDATION; LIVINGSTON COUNTY, ILLINOIS; THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION; THE ILLINOIS SHERIFFS ASSOCIATION; AND THE ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS

INTRODUCTION

The Lincoln Legal Foundation; Livingston County, Illinois; the National District Attorneys Association; the Illinois Sheriffs Association; and the Association of State Correctional Administrators; as *amici curiae*, submit this brief in support of the Petitioner herein, the People of the State of Illinois. *Amici* respectfully urge this Honorable Court to reverse the decision of the Appellate Court of Illinois in

the case at bar. Neither the United States Constitution nor this Court's holding in *Miranda v. Arizona*, 384 U.S. 436 (1966), commands so absurd a rule as that adopted in this case below. If imposed as a blanket doctrine upon correctional institutions, the lower court's reading of the Fifth Amendment would significantly impair the ability of prison administrators to maintain order within their institutions and to investigate crimes occurring behind bars.

INTERESTS OF *AMICI CURIAE*

The Lincoln Legal Foundation

The Lincoln Legal Foundation ("LLF") is a national, nonprofit, nonpartisan, public-interest law center which undertakes litigation, administrative proceedings, legal studies, and educational activities in matters promoting political, economic, and civil liberties; preserving constitutional government, including the separation and limitation of governmental powers; and defending the rights of innocent victims of crime.

LLF has a deep interest in the American criminal justice system and works to enhance its fairness and efficiency. LLF is concerned that American prisons and other correctional facilities be operated so as to serve the objectives of moral instruction, inculcation of respect for legitimate authority, and personal rehabilitation that are among the goals of imprisonment of persons convicted of serious crimes.[1] Absent those characteristics, prisons become, at

[1] The Illinois Constitution, for example, commands that "All penalties shall be determined . . . with the objective of restoring the offender to useful citizenship." Ill. Const., Art. I, Sec. 11 (1970).

best, expensive holding pens in which criminals take sabbaticals from careers in crime. At worst, they degenerate into graduate schools of crime as, crowded together and inadequately controlled, inmates prey upon each other, hardening their hatred and contempt of society, and honing their criminal skills.[2] Prisons should be communities, not where violent crimes are commonplace, but where—thanks to the regulation of inmate conduct and the fostering of discipline that custodial conditions allow—the commission of serious crimes is much less likely than in society at large. Anything else would defeat the purpose of correction and undermine the criminal justice system as a whole.

Inmates desirous of rehabilitating themselves thus share with the broad mass of innocent taxpayers a profound interest in seeing to it that extraordinary conditions of order and discipline prevail in correctional institutions. Federal and State taxpayers across the land will invest enormous sums over the course of the next few years to

[2] One set of commentators have described the problem as follows:

> "Jails, where there is a 'commingling of petty offenders with felons; first offenders with recidivists; and young, impressionable offenders with hard-core, predatory criminals,' have experienced especially high levels of prisoner brutality. Over half the American jail population has not been convicted or tried. These people often are either 'educated in the ways of more serious crimes by those with whom they must share their quarters or . . . are subjected to sexual assault by the more aggressive inmates.'
>
> "Rape is a principal form of domination in prison."

Engel and Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoners' Rights, and Violence*, 7 HARV. J. L. & PUB. POL. 413, 415 (1985), citing Flynn, *Jails and Criminal Justice*, in PRISONERS IN AMERICA 49, 57 (Ohlin ed. 1972); and Scacco, RAPE IN PRISON at 100 (1975). The problem increasingly commands the attention of the general public, and is noted by political leaders. *See* Lauder, FIGHTING VIOLENT CRIME IN AMERICA 127 (1985).

build new facilities for the housing and correction of our nation's rising population of convicted criminals. Correctional facilities that are doomed *not* to correct work a fraud upon the American people. LLF seeks, therefore, to voice the public's interest in opposing the imposition upon prison administrations of judicial rules that, while safeguarding no civil liberty, frustrate penological objectives.

Livingston County, Illinois

The County of Livingston is a political subdivision of, and a body politic within, the State of Illinois. It is established, and derives its corporate powers, pursuant to Article VII of the Illinois Constitution (1970). It is represented by its State's attorney, a constitutional officer of the State of Illinois chosen by the electors of the county pursuant to Article VI, Section 19 of the Illinois Constitution (1970). The State's attorney is both civil counsel to the county and the prosecutor of crimes that occur within it.

Livingston County's population numbers approximately 40,000. Located 100 miles southwest of Chicago, it is home to the Pontiac Correctional Center, a prison operated by the Department of Corrections of the State of Illinois. The Pontiac prison is one of Illinois's larger and more secure correctional facilities, housing about 1,950 inmates, all of whom are adult males convicted of serious crimes. When crimes are committed at the Pontiac prison, it is the responsibility of Livingston County to investigate and prosecute them. This results in a not insubstantial burden upon the county's courts, sheriff, and State's attorney, and upon its taxpayers.

National District Attorneys Association

The National District Attorneys Association i. a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all our citizens.

Illinois Sheriffs Association

The Illinois Sheriffs Association's membership comprises the 102 county sheriffs of the State of Illinois as well as 25,000 private individuals. The Association was organized to promote and extend assistance to county sheriffs by providing training seminars, scholarships, and educational and various other community services.

Association of State Correctional Administrators

The Association of State Correctional Administrators ("ASCA") is a professional association whose membership consists of the directors of the fifty State departments of corrections, the Federal Bureau of Prisons, and the correctional systems of the District of Columbia, the Commonwealth of Puerto Rico, Cook County, Illinois, the City of New York, New York, and the City and County of Philadelphia, Pennsylvania. ASCA is concerned that, if the holding in *Perkins* is not reversed, there will be grave, far-reaching consequences for the ability of correctional administrators to manage our nation's prisons safely and effectively.

STATEMENT

The facts of this case, as found by the courts below, are set out by the Appellate Court of Illinois in its reported decision, *People v. Perkins*, 176 Ill.App.3d 443, 444-446, 531 N.E.2d 141, 142-143, 126 Ill.Dec. 8, 9-10 (5th Dist. 1988). The salient points are these: Respondent Perkins, while serving a prison term for a crime unrelated to the murder at issue here, confided in a fellow inmate that he had killed a man, and he described the event in considerable detail. The fellow inmate—believing that "people should not kill people"—reported Perkins's confession to authorities. The confession as reported rang true; the details corresponded to the knowledge that the police had of the crime, and their nature was such that it was unlikely that they could have been known to someone who was not, in fact, the killer. To nail down the case the authorities asked the inmate-informant—who was not compensated in any way for his cooperation—to return to Perkins, this time accompanied by a law enforcement officer under cover as a friend and fellow prisoner. They were to seek repetition of the incriminating admissions. As it turned out, by the time of the reunion Perkins was housed in a county jail, awaiting trial on yet a third, completely unrelated charge. When the inmate-informant and the undercover agent encountered Perkins and began chatting with him, they did *not* read him his "*Miranda* rights". Perkins, prodded to discuss the murder by a means no more coercive than being asked if he had ever "done someone", proceeded with apparent alacrity and in great detail to recount the facts of the killing. An indictment followed.

The trial court granted Perkins's motion to suppress the evidence of his statements to the inmate-informant and the undercover officer. The Appellate Court of Illinois affirmed, declaring that "[w]e cannot permit police to subvert the defendant's fifth amendment right against self-incrimination by questioning the defendant, through informants and *while he was in custody*, without first warning him of his rights pursuant to *Miranda*." *Perkins*, *supra*, 176 Ill.App.3d at 450, 531 N.E.2d at 146, 126 Ill.Dec. at 13 (*emphasis added*).

That Perkins was "interrogated" while "in custody" appears to have been central to the Appellate Court's reasoning. As it evaluated the facts of the case, it emphasized its view that "although the defendant was incarcerated on other charges at the time [the inmate-informant and the undercover officer] elicited the incriminating statements, he was 'in custody' for purposes of *Miranda*." *Perkins*, *supra*, 176 Ill.App.3d at 447, 531 N.E.2d at 144, 126 Ill.Dec. at 10. The Appellate Court also held that *Perkins* conversation with the inmate-informant and the undercover officer amounted to prosecutorial interrogation under *Miranda*. *Ibid.*

Amici submit that the Appellate Court's error lay in its understanding of "interrogation" and "custody" within the framework of *Miranda*. It is a mistake that, if perpetuated, will do grave injury to the American penal system.

ARGUMENT

It is clear that Perkins's self-incriminating statements were thoroughly voluntary. They were altogether unforced, and were made in an environment that was entirely free of coercion. Perkins had not been accused of the murder and had no reason to believe that he was suspected of it. He did not believe that he was speaking with representatives of authority or even with persons in superior positions of any kind. He was under no illusions that the statements he made were protected by any privilege.[3]

To the contrary, Perkins knew that his conversations with the inmate-informant and the undercover officer were unprotected. Indeed, Perkins thought that the discussions were themselves part of a criminal enterprise; he was under the impression that he had joined a three-member conspiracy to break out of jail. Perkins had puffed that the jail was "rinky-dink" and that he "could arrange to have someone smuggle in a gun." *Perkins*, *supra*, 176 Ill.App.3d at 445, 531 N.E.2d at 143, 126 Ill.Dec. at 10. Perkins made his incriminating statements during a surreptitious, late-night rendezvous held in the jailhouse "after the other inmates went to sleep." *Ibid.* Seen in this light, Perkins's utterances regarding the murder were decidedly *not* a "confession" elicited under any kind of interrogation. They were, instead, the words of a braggart seeking to impress fellow inmates—in this instance, potential criminal confederates; on another day, perhaps potential cellblock victims or jail-gang followers—with his

[3] There is no suggestion that he was tricked into believing that he was discussing his history with, for example, an attorney retained to represent him.

fierceness, brutality, and willingness to go to any lengths to achieve an end that he desired.

The Appellate Court of Illinois believed that "pressures of interrogation", 176 Ill.App.3d at 449, 531 N.E.2d at 145, 126 Ill.Dec. at 11, inhere in "custodial questioning", irrespective of the context of the custody in which the questioning takes place. That is a misreading of the teaching of *Miranda* to which the facts of Perkins's case give the lie. The nature of the custodial circumstances in which inculpatory admissions are made is crucial to a sound assessment of the constitutional groundrules that control their use as evidence. Custody of a non-investigative kind, in which prisoners are held awaiting trial or while serving sentences, is as different from the setting of custody immediately following arrest as is such interrogative stationhouse custody from normal society. That is a reality that must be taken into account by the courts as they apply the strictures of *Miranda* and of the Self-Incrimination Clauses of the Fifth and Fourteenth Amendments to the world that is found behind prison walls.

I.

THE DECISION OF THE COURT BELOW WOULD EFFECTIVELY PROHIBIT THE NECESSARY AND VALUABLE USE OF UNDERCOVER AGENTS IN PRESERVING ORDER AND IN PREVENTING, DETECTING, INVESTIGATING, AND PROSECUTING CRIME IN PRISONS.

Violence among prisoners is pandemic in men's prisons in contemporary America.[4] It is the prevalent method of

[4] *See* Engel and Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoners' Rights, and Violence*, 7 HARV. J. L. & PUB. POL. 413 (1985); Sherman and Hawkins, IMPRISONMENT IN AMERICA (1981); Carriere, *The Dilemma of Individual Violence in Prisons*, 6 NEW ENG. J. ON PRISON L. 198 (1980); Toch, POLICE, PRISONS AND THE PROBLEM OF VIOLENCE (1977).

asserting and establishing masculinity within prison society.[5] It is also a major factor in the arrangement and rearrangement of a prison's internal structure of authority.[6] Against this background, violence directed against—and particularly the murder of—correctional employees represents the highest level of danger in correctional systems. In 1988, a total of 18,934 assaults were reported to have been committed by inmates in Federal and State correctional facilities across America; of these, 1,686 were directed against prison staff and 17,248 were targeted against fellow inmates. Camp, CORRECTIONS YEARBOOK 18 (1989).[7]

While the identities of assailants of both inmates and correctional personnel are frequently known, it is often extremely difficult to obtain evidence that will support prosecution and conviction. Such murders are rarely witnessed by prison staff members or inmates not complicit in the crime. Because of the nature of the environment in which such murders and other crimes of violence are committed, corrections administrators must regularly rely upon assailants to incriminate themselves by communicating to others their involvements in the crimes.

Sometimes such communications are discussions among co-conspirators; at other times they are in the nature of

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[5] Scacco, RAPE IN PRISON 3 (1975).

[6] Irwin, *The Changing Social Structure of the Men's Prison*, in CORRECTIONS AND PUNISHMENT 21 (Greenberg ed. 1977); McCleery, *Communication Patterns and Bases of Systems of Authority and Power*, in THEORETICAL STUDIES IN SOCIAL ORGANIZATION OF THE PRISON 58 (Cloward et al. eds. 1960).

[7] Without doubt the vast majority of unwitnessed assaults upon prisoners go unreported, as the only safe way for a prisoner to complain about an assault by fellow prisoners is to enter voluntarily into solitary confinement. Weiss and Friar, TERROR IN THE PRISONS 168 (1974).

efforts to bully other inmates into behavior compliant with the perpetrators' wishes; at still other times they may be instances of bragging to impress new inmates with the perpetrators' toughness and their immunity from correctional control. Testimony from another inmate, a visitor, or a person working undercover in a jail or prison is often essential to the successful prosecution of such crimes—and to send clear messages to those who might commit other violent crimes that they will be held accountable for their deeds.

A case precisely on point arises from the Pontiac prison, situated within the jurisdiction of *Amicus* Livingston County, Illinois. On September 3, 1987, within the walls of the Pontiac prison, someone accosted the superintendent, Robert Taylor. Brutally beaten and stabbed ten times, Mr. Taylor died. It fell to the State's attorney of Livingston County to investigate the murder and, if possible, to prosecute those who committed it.

Knowing that a criminal gang had been surreptitiously, but effectively, organized within the prison, and that it saw itself in competition with prison authorities for control of the cellblocks, investigators sought intelligence as to the gang's connections, if any, with the crime. Knowing, too, that the gang owed allegiance to gang chieftains remaining at large on the streets of Chicago, they arranged for an inmate from another prison—thought by gang members to be a loyal gang lieutenant, but in fact a police informant—to visit the Pontiac facility, and while "wired" with a judge's approval to record conversations, to pose as a conduit of information to the gang's outside bosses. In short order, gang leaders within the prison told the informant in detail that they had murdered the superintendent and how they had done so.

A Livingston County grand jury handed up indictments charging the gang leaders who had planned, ordered, and executed the crime with first degree murder, conspiracy to commit murder, and solicitation to commit murder. The indictments were based on the admissions they had made to the informant, and the informant's testimony would have been essential to the prosecution of the case. On February 17, 1989, however, the trial court in that case—the Circuit Court for the Eleventh Judicial Circuit of Illinois, which includes Livingston County—ordered the evidence of the admissions suppressed. *People v. Johnson*, Cir. Ct., 11th Jud. Cir., Ill., No. 87-CF-111 (Feb. 17, 1989); *People v. Carter*, Cir. Ct., 11th Jud. Cir., Ill., No. 87-CF-112 (Feb. 17, 1989). Both cases have been appealed by the State to the Appellate Court of Illinois for the Fourth Judicial District, where they now pend as Nos. 489-181 and 489-182.

In explaining its orders of suppression, the trial court cited the decision of the Appellate Court of Illinois in the instant case as controlling in those cases. Unless the decision below is reversed, therefore, the search for truth in *Johnson* and *Carter* will be frustrated and justice in those cases will be denied. Indeed, unless the decision below is reversed, the people of Illinois and Livingston County will be severely handicapped in their battle for the control of Pontiac prison.[8] That handicap, in turn, will afflict

[8] Pontiac prison's situation is hardly unique. The lower court's decision in *Perkins* is being urged upon an Illinois trial court in a pending case involving allegations of an attempt by an inmate of the Dixon Correctional Center in Illinois to hire a killer to murder his daughter's boyfriend. In that case, *People v. Latona*, Cir. Ct., Lee Co., Ill., No. 89 CF 114, it is alleged that a man serving at the Dixon prison after his conviction on charges unrelated to the killing he sought from behind bars to cause, solicited

(Footnote continued on following page)

every correctional facility in America. The consequences for Americans, within our prisons and without, will be unspeakably tragic.

II.

THE COURT BELOW HAS MECHANICALLY APPLIED THE *MIRANDA* RULE TO A SITUATION IN WHICH THERE WAS NO CUSTODIAL POLICE INTERROGATION, NO DANGER OF COERCION, AND NO COMPELLED SELF-INCRIMINATION.

As the uncontested facts before the Appellate Court of Illinois make clear, the self-incriminating statements which are the subject of this case were voluntarily made by Perkins during an unforced conversation that he had with two men whom he (incorrectly) assumed were simply fellow inmates, and with whom he felt comfortable enough to plan a jail escape. The conversation took place, not in some jailhouse to which Perkins had been forcibly removed for the purpose of interrogation or even trickery, but in the cell block in which Perkins happened to be living. The conversation began and ended in accordance with his wishes. No visible signs of police or other authorities were present. No threats or intimidation were used. No coercion, direct or indirect, physical or psychological, was applied by Perkins's companions or felt by him.

It is plain from these facts that Perkins was not subject to "custodial police interrogation," if those words are to

[8] *continued*
a fellow inmate whom he believed to be a "hit-man" to carry out the murder. The "hit-man" turned out to be an undercover police officer. Talks between the "hit-man" and the convict were recorded electronically with judicial approval. The inmate, invoking the decision below in this case, has moved to suppress the evidence of his statements.

have any meaning which plausibly accords with reality. Nonetheless, in an application of free-floating doctrine unconstrained by facts or the necessity of making distinctions, the lower court managed to hold that Perkins indeed had been subjected to a "custodial police interrogation" requiring the employment of the procedural safeguards outlined in *Miranda*. In order that it arrive at that holding, the court had to cobble together definitions of "custody" and "interrogation" from various of this Court's precedents.[9] Simply adding together these two factors, the lower court apparently reasoned that

CUSTODY + INTERROGATION = *MIRANDA*

and thus arrived at its astonishing result.[10]

This is a gross caricature of the reasoning behind *Miranda*, which was that procedural safeguards—its famous

[9] The Appellate Court seemingly found in *Mathis v. United States*, 391 U.S. 1 (1968), this Court's endorsement of the notion that incarceration of any kind, for any reason, always constitutes "custody" for purposes of *Miranda*. *Perkins*, *supra*, 176 Ill.App.3d at 447, 531 N.E.2d at 144, 126 Ill.Dec. at 11. Similarly, the Appellate Court relied on this Court's opinion in *Rhode Island v. Innis*, 446 U.S. 291 (1980), for the limitless principal that interrogation has occurred whenever the police do or say anything that they should know is reasonably likely to elicit an incriminating response. No other authorities were cited by the Appellate Court as helpful in guiding its analysis on this point.

[10] Astonishing is not an inapt characterization. Three commentators—each generally favorable to a very broad application of the *Miranda* rule—have explicitly addressed the kind of situation presented by *Perkins*. Each has had no difficulty in concluding that *Miranda* would not apply. White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 MICH.L. REV. 1209, 1246-1248 (1980); Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?*" 67 GEORGETOWN L.J. 1, 45-69 (1978); Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX.L.REV. 203, 235-6 (1975).

warning—may be necessary as a "practical reinforcement", *Michigan v. Tucker*, 417 U.S. 433, 444 (1974), of an individual's Fifth Amendment rights when he is subjected to "incommunicado interrogation. . . . in a police-dominated atmosphere" that "carries its own badge of intimidation," that "exacts a heavy toll in individual liberty and trades on the weakness of individuals," and that is inherently likely "to subjugate the individual to the will of his examiner." *Miranda*, 384 U.S. at 445, 457, 455, and 457. Only under these particular conditions is *Miranda's per se* rule held to supplant the "totality of the circumstances" requirement that self-incriminating statements *actually must be shown* to be involuntary. *See, e.g., Minnesota v. Murphy*, 465 U.S. 420 (1984).

Of course, none of these "compelling circumstances" that the *Miranda* rule was created to combat has been shown to exist here. Apparently taking the partial overthrow of the "totality of the circumstances" test literally, the lower court applied *Miranda's per se* rule without undertaking to inquire whether any of the circumstances surrounding the "custody" and "interrogation" in cases of this kind provide reason for *Miranda's* application.

This Court's precedents—especially its more recent decisions—teach that the *Miranda* rule is to be applied flexibly and intelligently, with some sensible regard for whether the rule's application to a particular kind of situation will do anything to advance the rule's policies.[11] In reversing the decision below, this Court ought to make clear that the retreat into formalism and the rote application of *per se* rules—"anodynes for the pain of reasoning"—are not substitutes for the hard job of judging cases.

[11] *Oregon v. Elstad*, 470 U.S. 248 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971).

III.

THE LOWER COURT'S CONFECTION OF A SWEEPING PRIVILEGE AGAINST SELF-INCRIMINATION IN THE SETTING OF NON-INVESTIGATIVE CUSTODY PUTS THE FIFTH AMENDMENT INTO ASYMMETRY WITH THIS COURT'S APPLICATION OF THE FIRST, FOURTH, SIXTH, AND FOURTEENTH AMENDMENTS IN THE SAME SETTING.

Although prison gates do not lock out the United States Constitution, this Court has acknowledged that "imprisonment carries with it the circumscription or loss of many significant rights." *Hudson v. Palmer*, 468 U.S. 517, 524 (1984). In *Hudson*, *supra*, 468 U.S. at 526, for example, the Court held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches and seizures does not apply within the confines of the prison cell."

Protections of the First and Fourteenth Amendments have been held to avail in prison settings, as in *Procunier v. Martinez*, 416 U.S. 396 (1974), where regulations governing prisoner correspondence touching upon matters of religion and politics were struck down. But even there the Court declined to apply the standard of "strict scrutiny" with which it would test such governmental activity in society at large, and instead it examined prison rules—even in matters as sensitive as religious and political expression—against the yardstick of "reasonableness".

Thus, in *Pell v. Procunier*, 417 U.S. 817 (1974), the Court upheld prison rules prohibiting inmates from giving news media interviews inside the institution. In *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977),

the Court refused to overturn bans imposed by prison administrators against union meetings and bulk mail union solicitations. In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court sustained security rules that prohibited inmates from receiving hardback books unless they were shipped directly from publishers, bookstores, or book clubs. In *Block v. Rutherford*, 468 U.S. 576 (1984), the Court reviewed and approved the constitutional validity of prison rules barring physical contact between prisoners and their visitors. In *Turner v. Safley*, 482 U.S. 78 (1987), the Court upheld regulations on prisoners' outside correspondence. And in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the Court sustained a prison regimen notwithstanding the fact that it limited the ability of Moslem inmates to take part in weekly religious ceremonies.

Similarly, in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) this Court found no infringement of the right to counsel guaranteed by the Sixth Amendment where, after an accused's arraignment, a police informant sharing his cell listened to and reported his incriminating statements. The Court's approval of the informant's evidence in *Kuhlmann* is all the more striking in that, although it did not involve interrogative custody, neither did it arise in the context of post-conviction correctional custody.

Cases such as these evidence this Court's understanding that the places in which suspects and criminals are held, not for interrogation but for custody or correction, are a universe apart from normal society. Their populations contain high concentrations of the wicked and violent.

Sound, constitutional management of prisons, therefore, may well include even the "complete withdrawal of certain rights", *Hudson*, *supra*, 468 U.S. at 524, if "justified by considerations underlying our penal system." *Price v.*

Johnston, 334 U.S. 266, 285 (1948). As it was put in *Hudson*, *supra*, 468 U.S. at 524, "[t]he curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, *Wolff v. McDonnell* [418 U.S. 539, 555 (1974)], chief among which is internal security. . . ."

The realities of prison life continue to justify the constraints on liberty that this Court has acknowledged as appropriate. Just as the peculiar circumstances of correctional, as opposed to interrogative, custody entail special applications of the First, Fourth, Sixth, and Fourteenth Amendments, so is a distinct—and limited—application of the Fifth Amendment warranted in the same context. Just as prisoners have no justifiable expectations of privacy in their cells, so they have virtually no legitimate expectations of privacy in their uncoerced custodial conversations. They have no privilege in communication with fellow inmates, or with persons they believe to be their fellow inmates. They have every right to be free from coerced confessions, but no entitlement to blanket insulation of intramural conversations from use in evidence.

CONCLUSION

When Perkins incriminated himself he was in jail, but he was not undergoing "custodial police interrogation". *Miranda* simply does not apply. Perkin's statements were entirely uncoerced and uncompelled. Therefore the State committed no transgression against the strictures of the Fifth Amendment which, in any event, should confer no special privilege upon intramural communications by prisoners held in non-interrogative custody. Blanket prohibition of the use of informants and undercover agents in prison populations would do nothing to protect the right against self-incrimination. It would, however, demarcate the end of imprisonment as a noble experiment in correction and the perfection of its transformation into a Hobbesian hell, a war of everyone against everyone—inmates, guards, and staff—unfortunate enough to be found within prison walls. The judgment of the court below should be reversed.

Respectfully submitted,

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November 16, 1989.

No. 88-1972

... Court, U.S.
DEC 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF ILLINOIS,

Petitioner,

—v.—

LLOYD PERKINS,

Respondent.

ON WRIT OF *CERTIORARI* TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF ILLINOIS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan, membership organization dedicated to preserving the constitutional protections embodied in the Bill of Rights. The ACLU of Illinois is one of its statewide affiliates.

The present case involves the scope of the right against self-incrimination provided by the Fifth Amendment. Since the right against self-incrimination affects the fundamental nature of the relationship between the individual and the state, the ACLU has long been concerned with any action that accedes to the government the power to compel an individual to provide incriminating information. Because the government action in this case jeopardizes this effort, we respectfully submit this brief as *amici curiae*.

STATEMENT OF THE CASE

On November 8, 1984, Richard Stephenson was shot and killed in Fairview Heights, a suburb of East St. Louis, Illinois. The crime was still unsolved in March 1986 when Kenneth Korunka, an agent of the Illinois Department of Criminal Investigation, contacted the Fairview Heights Police Department about a possible tip in the case. The tip came from a state prison inmate named Donald Charlton, who claimed that respondent Lloyd Perkins, another inmate, had boasted to Charlton about

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of this Court pursuant to Rule 36.2.

killing someone in the East St. Louis area at about the time that Stephenson was murdered in Fairview Heights.

By the time this information was conveyed to the Fairview Heights Police Department, respondent was incarcerated in the Montgomery County Jail in Illinois awaiting trial for an unrelated charge of aggravated battery. Apparently, the Fairview police concluded that respondent's initial comments to Charlton about the Stephenson murder were either insufficient or unreliable. They therefore decided to elicit another confession from him by placing an undercover agent in the same cellblock. As part of this scheme, the police arranged for Charlton's transfer to the Montgomery Jail so that he could introduce respondent to the undercover agent, John Parisi.

Once reunited, Charlton told respondent that he and Parisi had escaped from a work release program and been rearrested while committing a burglary. Charlton then suggested that the three of them escape from the Montgomery County Jail together. When respondent agreed, he was steered into a discussion about escape plans, during which the three men agreed that they would kill anyone who tried to stop them. According to plan, Charlton then indicated that he was not comfortable with murder, in contrast to respondent and Parisi. Again, as planned, Parisi asked respondent if he had ever killed anyone. Respondent repeated his story about the murder in East St. Louis and, upon continued questioning by the undercover agent Parisi, provided considerable detail about the crime.

Later that same day, respondent was arrested for the murder of Richard Stephenson. He was given Miranda warnings for the first time following his arrest and requested an attorney.

Prior to his trial on the murder charge, respondent filed a motion to suppress the incriminating statements he had made in the Montgomery Jail. The trial court granted his motion (Pet.App.11a), based on its finding that Parisi and Charlton were agents of the state who had subjected respondent to custodial questioning in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

The appellate court affirmed the trial court's ruling. (Pet.App.1a). Citing *Mathis v. United States*, 391 U.S. 1 (1968), the appellate court held that Miranda warnings are required for any custodial interrogation, even when the purpose of the custody is unrelated to the purpose of the investigation. In addition, it quoted *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980), for the proposition that *Miranda* "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Finally, the appellate court explained that its decision was intended to prevent the police from doing "indirectly what they may not do directly." (Pet.App.8a).

The Illinois Supreme Court denied the State's motion for leave to appeal without an opinion. (Pet.App.10a).

SUMMARY OF ARGUMENT

In *Miranda*, this Court adopted a prophylactic rule designed to ensure that the Fifth Amendment rights of criminal suspects are duly respected. That holding reflects at least three constituent principles. First, the constitutional prohibition against coerced confessions is not limited to physical force. Second, custodial questioning is inherently coercive. Third, a prophylactic rule is essential in this context, both because of the importance of the constitutional right involved and the ease with which it could be otherwise circumvented.

Illinois does not challenge these principles directly. Instead, it contends that custodial questioning by an undercover agent does not violate *Miranda* since a criminal suspect cannot be coerced by the authority of the state if he does not know that he is talking to a state agent.

Despite its superficial appeal, this characterization of *Miranda* is fundamentally flawed. Even petitioner does not seriously dispute that *Miranda* would have been triggered if respondent had been questioned by a uniformed officer while in the Montgomery Jail. The fact that he was incarcerated at the time for another crime is constitutionally irrelevant. *See Mathis v. United States*, 391 U.S. 1 (1968). Petitioner's argument thus reduces to the claim that a police officer can avoid the requirements of *Miranda* simply by taking his uniform off.

This Court has never endorsed such an exception to *Miranda*'s prophylactic rule and should not do so now. *Cf. United States v. Henry*, 447 U.S. 264 (1980)(custodial interrogation by undercover agent after right to counsel had been asserted violates Sixth Amendment). Nor is this a case of simple "misplaced trust" like *Hoffa v. United States*, 385 U.S. 293 (1966). Jimmy Hoffa was not in custody at the time he confided in an undercover agent. Here, the

police engaged in a deliberate ruse to "elicit [Perkins'] incriminating response" that only worked because he was in custody. *Rhode Island v. Innis*, 446 U.S. at 301. Respondent's susceptibility to this jailhouse ruse hardly establishes that his confession was voluntary.

Petitioner's argument in this case is also inconsistent with the very nature of a prophylactic rule. *Miranda* works because it is clear. That clarity would be lost if the decision below were reversed based on an *ad hoc* determination about the existence of coercion. A reversal in this case would also send precisely the wrong signal to law enforcement officers around the country. By condoning the police behavior in this case, it would encourage deceit and trickery rather than respect for constitutional rights.

Amici respectfully urge this Court to avoid that result.

ARGUMENT

MIRANDA'S PROPHYLACTIC RULE THAT WARNINGS MUST BE GIVEN PRIOR TO ALL CUSTODIAL INTERROGATIONS SHOULD NOT BE WAIVED FOR UNDERCOVER CUSTODIAL INTERROGATIONS

Miranda requires a suspect to be warned of his or her constitutional rights before custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966). The warnings allow a suspect to be "aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurances of real understanding and intellectual exercise of the privilege." *Id.* at 469. In the absence of the warnings any statements can be "excluded at trial

despite their voluntary character under traditional principles." *Michigan v. Tucker*, 417 U.S. 433, 443 (1974).

The Court has steadily maintained "that the now-famous warnings be given in every case, regardless of the individual circumstances." *Solem v. Stumes*, 465 U.S. 638, 647 n.7 (1984). The *Miranda* prophylactic rule "overprotects" suspects from custodial interrogation for the sake of "efficient judicial administration of the Fifth Amendment guarantee and the need to create institutional respect for Fifth Amendment values." *Duckworth v. Eagan*, 492 U.S. ___, 109 S.Ct. 2875, 2883 (1989)(O'Connor, J., concurring).

Since the adoption of *Miranda*, this Court has only once allowed an exception to be carved out of the prophylactic rule, and only then for the narrow purpose of protecting the public safety. *New York v. Quarles*, 467 U.S. 649 (1984). Even in creating this exception, the Court emphasized the importance of having the Miranda rule strictly enforced, recognizing that exceptions to it "lessen the desirable clarity of that rule." *Id.*[2] Petitioner's suggestion that a second exception to Miranda be instituted for custodial interrogations by undercover police should be rejected.

A. The Questioning Of Respondent In This Case Constituted Custodial Interrogation

Miranda held that anytime the government undertakes the interrogation of a person in custody, the individual must first be informed of his or her rights. *Miranda*, 384 U.S. at 468. In this case, a custodial interrogation clearly took place.

1. Respondent Was In Custody

Respondent -- who was in jail -- was "in custody," in that he was "deprived of his freedom by the authorities in [a] significant way." *Id.*, 384 U.S. at 478. That respondent was interrogated about an offense unrelated to his imprisonment is constitutionally irrelevant. *Mathis v. United States*, 391 U.S. 1. In *Mathis*, the Court held that not to recognize as "in custody" for *Miranda* purposes those persons interrogated in prison for offenses unrelated to their imprisonment would go "against the whole purpose of the *Miranda* decision which was to give meaningful protection to Fifth Amendment rights." *Id.* at 5. The Court forged a link between the police-controlled environment that the suspect was placed in and the purpose of the government's interrogation: since the government intended to obtain incriminating statements to be used at trial against the suspect, the *Miranda* definition of custody had to apply. *Id.* at 3-4. As the Court said about the activity at issue in *Mathis*, any distinction between undercover government interrogation and *Miranda* becomes "too minor and shadowy to justify a departure from the well-considered conclusions of *Miranda* with reference to warnings to be given to a person held in custody." *Id.* at 4.

Herein lies the critical difference between this case and *Hoffa v. United States*, 385 U.S. 293. Hoffa could not claim that Miranda warnings should have been given in his circumstance because he was not "in custody" at the time of the undercover questioning; in fact, the incriminating conversation took place in Hoffa's hotel room so he had complete control over the environment unlike the

[2] The Court preserved the efficacy of the *Miranda* prophylactic rule by expecting police officers to distinguish "between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 659.

respondent here who was in a government-controlled facility. *Id.* at 294.

2. Respondent Was Interrogated

"Interrogation" under *Miranda* encompasses more than simply official government efforts to question a suspect. To constitute an "interrogation" there must be, first, proof of government involvement and, second, evidence of a deliberate government effort to elicit incriminating statements from the suspect. *See generally*, *Rhode Island v. Innis*, 446 U.S. 291; *United States v. Surridge*, 687 F.2d 250, 253, *cert. denied*, 459 U.S. 1044 (1982).

The actions of the state of Illinois meet both of these requirements. In fact, in this case, the police *initiated* the inquiry of the suspect and *manipulated* the circumstances so that the inquiry could take place. As petitioner has admitted, the possibility of obtaining incriminating evidence singularly motivated the police to use an undercover agent. It cannot be said that the police did "nothing to direct or control or involve themselves in the questioning of a person in custody." *United States v. Surridge*, 687 F.2d at 253. Rather, the police here conducted the undercover operation for the express purpose of eliciting an incriminating response. Thus, this undercover government interrogation was clearly action "that the police [knew was] likely to elicit an incriminating response from the suspect," *Rhode Island v. Innis*, 446 U.S. at 300-01, and must be considered "custodial interrogation."

Indeed, in the analogous Sixth Amendment context, this Court has held that questioning by an undercover agent placed in a suspect's cell constituted "interrogation" which could not be undertaken once a request for counsel had been made. *United States v. Henry*, 447 U.S. 264; *see Maine v. Moulton*, 474 U.S. 159 (1985). This precedent

compels the similar conclusion that the questioning which took place in this case constituted "interrogation" for Fifth Amendment purposes as well. Any other ruling would lead to a bizarre asymmetry between the Fifth and Sixth Amendments.

B. The Court Should Not Carve Out An Exception To *Miranda* For Custodial Interrogation By Undercover Agents.

Miranda recognized several constituent principles which will be undermined by waiving the necessity of warnings in instances of undercover custodial interrogations. In particular, *Miranda* recognized that custodial questioning is inherently coercive and that the constitutional prohibition against coerced confessions is not limited to physical force. These important protections would be lost were the Court to carve out an exception to the prophylactic rule in the circumstances of this case. *See* pp.9-14, *infra*. *Miranda* also stands for the proposition that a prophylactic rule is essential in this context, both because of the importance of the constitutional right involved and the ease with which it could be otherwise circumvented. This principle will likewise be sacrificed by an exception to the rule. *See* pp.14-16, *infra*.

1. Undercover Government Interrogation Is Coercion As Envisioned By The Court In *Miranda*

The Court's definition of when a suspect has been coerced to confess, which has evolved over time, encompasses more than mere physical force; it includes acts of psychological deception and trickery committed by the government in obtaining incriminating statements.

Initially, at the state level, the inquiry of coercion consisted of a determination into whether or not govern-

ment interrogation efforts passed the Fourteenth Amendment due process "shock the conscience test." *See e.g., Watts v. Indiana*, 338 U.S. 49 (1949); *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936).[3] At the federal level, the Court in *Bram v. United States*, 168 U.S. 532 (1897), maintained a "free and voluntary" standard.[4] This federal standard became applicable to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964).

In *Miranda*, the Court decided that this test was no longer viable. The Court considered the interrogation atmosphere so overwhelming that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Miranda*, 384 U.S. at 458. Custodial interrogation of persons "suspected or accused of crime contain[] inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.

Thus, *Miranda* stands for the proposition that the inquiry into whether the government engaged in "coercion" in a given circumstance involves more than just a determination of whether the suspect decided to talk out of fear. Because coercion can arise from deliberate government efforts to convince one to speak when he or she

[3] Under this due process test, the Court would examine the procedures used by the police to obtain the confession, searching for evidence of physical and psychological coercion that would discount the voluntariness of the confession.

[4] A confession had to be "free and voluntary: that is, [it] must not be extracted by any sorts of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Bram*, 168 U.S. at 542-43.

would not have ordinarily -- but for the efforts of the government -- a court must examine the circumstances surrounding the government's attempt to interrogate the suspect. Specifically, a court must determine if the suspect knew what his or her rights were and if the suspect understood "that he [was] not in the presence of persons acting in his interest." *Id.* at 469. *See Duckworth v. Eagan*, 109 S.Ct. at 2875; *California v. Prysock*, 453 U.S. 355, 359-360 (1981).

At its core, *Miranda* stands for the proposition that government efforts to capitalize on the ignorance of suspects and to keep them uninformed of the consequences of incriminating statements are not to be tolerated. The government cannot create scenarios "for no other purpose than to subjugate the individual to the will of his examiner." *Miranda*, 384 U.S. at 457, or to maneuver a suspect "into a position from which the desired objective [a confession] may be attained." *Id.* at 455 (quoting Inbau and Reid, Lie Detection and Criminal Interrogation 185 (3d. ed. 1953)).

In its opinion in *Miranda*, the Court denounced practices that were nothing more than a ruse to get a suspect to give incriminating information. The Court specifically discussed and criticized insidious techniques such as police officers who gave suspects false legal advice,[5] used role playing to gain the confidence of a suspect[6] or manipulated a *bona fide* police investigatory

[5] *Miranda*, 384 U.S. at 455.

[6] A sheme known as the "Mutt and Jeff" routine involved police officers portraying different roles in order to get a suspect to confess. The first cop, Mutt," would be forceful and cruel to the suspect. The second cop, Jeff," would attempt to gain the confidence of the suspect by

(continued...)

technique to convince a suspect to give incriminating testimonial evidence.[7] Undercover interrogation is substantively no different than any of these offensive practices. Like the police practice of deliberately giving false legal advice condemned in *Miranda*, undercover interrogation lulls the suspect into a false sense of security about the legal consequences of a conversation for the sole purpose of obtaining incriminating statements.

In *Rhode Island v. Innis*, 446 U.S. 291, the Court further elaborated on how deceptive practices by the police should be treated. If the "practice" is one that "police should know is reasonably likely to evoke an incriminating response from a suspect," then the safeguards of *Miranda* apply. *Id.* at 301.

The action of the government in this case is precisely the type of deceptive activity which *Miranda* meant to abolish. First, the government placed someone in his cell with whom the suspect was familiar to guarantee that a rapport would be established. Second, the undercover agent concocted a scheme designed specifically for the purpose of convincing the suspect to make incriminating statements. Third, the government asked the suspect

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[6] (...continued)
befriending him or her and then convincing the suspect to confess through kindness. *Miranda*, 384 U.S. at 452.

[7] The police would manipulate the standard lineup scenario with a practice known as the "reverse lineup." In this practice, the police would set up a phony lineup scenario where the suspect, after initially being questioned, would be placed in a lineup and then someone would point the suspect out as the guilty party. After the lineup, questioning would resume and the police would continue as if the suspect's guilt had been firmly established. *Miranda*, 384 U.S. at 453.

specific questions with the hope of obtaining incriminating answers.

Undercover government interrogation such as this is coercion in the *Miranda* sense -- it implicates the exact same constitutional concerns in that it is a practice which seeks to use the intimidating prison setting as a tool to coerce an incriminating statement. The practice provides the government with an easy opportunity to "persuade, trick or cajole [a suspect] out of exercising his constitutional rights." *Miranda*, 384 U.S. at 455. It is one of the "deceptive stratagems" used "to keep the subject off balance . . . by trading on his insecurity about himself and his surroundings." *Id.* at 455.

In the prison setting, the protection provided by *Miranda* is particularly necessary. An inmate cannot resist "the powerful psychological inducements to reach for aid when [he or she] is in confinement." *Henry*, 447 U.S. at 274; *Miranda*, 384 U.S. at 448-54. "The mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." *Henry*, 447 U.S. at 274.

"Confinement of the suspect increases the power of the police in an important respect. Because the suspect's ability to select people with whom he can confide is completely within their control, the police have a unique opportunity to exploit the suspect's vulnerability. In short, the police can insure that if the pressures of confinement lead the suspect to confide in anyone, it will be a police agent. In view of the government's control over the suspect's channels of communication, it is blatantly unfair to allow the government to exploit the suspect's vulnerability by trickery of this type." White, *Police Trickery in Inducing Confessions*, 127 U.Pa.L.Rev. 581, 605 (1979)(footnotes

omitted). *See also* Dix, *Undercover Investigations and Police Rulemaking*, 53 Tex.L.Rev. 203, 230 (1975).[8]

"Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.'" *Miranda*, 384 U.S. at 459 (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)). Undercover government interrogation is such a practice.

2. Public Policy Demands That An Exception Not Be Carved Out Of *Miranda* For Undercover Custodial Interrogations

If the fruits of undercover governmental interrogations of persons in custody are permitted to be introduced at trial notwithstanding the absence of Miranda warnings, the importance of Miranda will be significantly diminished.

Unlike the situation in *New York v. Quarles*, 467 U.S. 649, here, the Court cannot carve out an exception which preserves the efficacy of *Miranda* and the clarity of its prophylactic rule. The government's use of undercover

[8] A growing number of state courts, in recognition of this problem, prohibit undercover government interrogation. *Holyfield v. State*, 711 P.2d 834 (1985); *State v. Fuller*, 278 N.W.2d 756, *rehearing overruled*, 281 N.W.2d 749 (1979); *State v. Travis*, 360 A.2d 548 (1976); *Commonwealth v. Mahnke*, 335 N.E.2d 660, *cert. denied*, 425 U.S. 959 (1976); *Taref v. State*, 512 P.2d 923 (1973); *Commonwealth v. Hamilton*, 285 A.2d 172 (1971). The experience at the state court level has shown that undercover interrogation can give rise to the type of coercion that *Miranda* meant to prevent. *See e.g.*, *State v. Atkins*, 446 P.2d 660, 662 (1968)(where the defendant was placed in a cell with a much larger, violent prisoner, who was working for the state, and who threatened the defendant with death if he did not confess).

interrogation fundamentally conflicts with *Miranda* in that it attempts to dispense with the required warnings for the express purpose of obtaining incriminating testimonial evidence from an ignorant suspect.

If this Court were to make an exception for undercover government interrogation, it would eviscerate the certainty of *Miranda*'s prophylactic rule. It would place the lower courts in the difficult position of attempting to sort out acceptable forms of coercion from unacceptable forms.

Moreover, confessions produced from undercover interrogation would force the courts to revisit questions about the reliability of self-incriminating statements. The practice contravenes the notion that:

> Miranda's well-known warning requirements provided a protection against the possibility of unreliable statements in every instance of in-custody interrogation and thereby covered many situations in which the danger [was] not necessarily as great as when the accused is subjected to overt and obvious coercion.

Michigan v. Payne, 412 U.S. 47, 53 (1973)(quoting *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966)). In an environment where feigned displays of toughness may be necessary for survival, the likelihood of an inmate exaggerating or even fabricating criminal behavior is no less than that of a suspect in the stationhouse interrogation context. In the present case, the government deliberately placed respondent in the midst of a escape scheme where an

admission of a past violent act was almost required of him by the undercover agent in order to maintain the scheme.

As this case proves, undercover government interrogation provides such an easy way to circumvent *Miranda* that carving out an exception for such behavior would render the rule itself virtually meaningless. Undercover interrogation would permit agents to act with pre-*Miranda* zeal and to pursue a suspect "until a confession is obtained." *Miranda*, 384 U.S. at 468. The police would resort to using undercover agents to obtain incriminating statements in both the stationhouse and the jail cell. The police would be able to disregard the notion that "the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Id.* at 460. Prosecutors would resort to the pre-*Miranda* practice of introducing incriminating statements of questionable validity as the sole evidence in criminal trials.

In short, the criminal justice system would revert back to its pre-*Miranda* state: suspects would be ignorant of their rights and the consequences of any statement made to the police and the Fifth Amendment would be "[r]ights declared in words . . . lost in reality." *Id.* at 443 (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

C. If The Court Adopts An Exception To *Miranda* For Undercover Custodial Interrogations, The Exception Should Be Narrowly Limited To Circumstances In Which The Police Involvement Is Minimal, Which Is Not This Case

Amici have argued that all custodial interrogations -- including those accomplished through the deceptive use of undercover agents -- are so inherently coercive that

Miranda necessarily applies. Should the Court disagree and carve out an exception to *Miranda* for custodial interrogations by undercover agents, it ought to limit the exception, as it has in the analogous Sixth Amendment context, to circumstances in which the police have not actively elicited a confession from the suspect.

In *United States v. Henry*, 447 U.S. 264, the Court held that when the government used an undercover agent to engage the defendant in conversation it had undertaken "the functional equivalent of interrogation," *id.* at 277, and thus that the Sixth Amendment was implicated by such action. The Court characterized the efforts proscribed by the Sixth Amendment as those in which the agent "deliberately used his position to secure incriminating information from [the defendant] when counsel was not present." *Id.* at 270. In subsequent cases, the Court has made clear that the Sixth Amendment is not implicated simply by showing that an undercover agent reported incriminating statements to the police; rather, the defendant must demonstrate "that the police and the informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986). *See also Maine v. Moulton*, 474 U.S. 159.

This distinction is similarly relevant to the Fifth Amendment analysis required in this case. Here, the undercover agent did more than merely report an incriminating statement. This was police action at its most aggressive. First, the police arranged not only to have an undercover agent, but also the informant, placed in respondent's cell. Second, the agent, with the informant, concocted an elaborate scheme to compel respondent to confess to the crime at issue. Third, an integral part of the scheme devised by the government required the respondent to boast of this prior killing. It is difficult to

imagine a more deceptive piece of trickery by an undercover agent.

While certain undercover custodial interrogations might not rise to the level of coercion (or might not, therefore, be interrogations), *Kuhlmann v. Wilson*, 477 U.S. 436, this is certainly not such a case. The deceptive hoax manipulated upon respondent herein is exactly the type of police activity sought to be proscribed by *Miranda*.[9]

[9] Indeed, petitioner itself recognizes that manipulative undercover custodial interrogations can be coercive and thus proscribed by *Miranda*. Petitioner's Brief at 22.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm the decision below.

Respectfully submitted,

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Dated: December 15, 1989